Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-228

WELLMAN INDUSTRIES, INC.,

Petitioner,

—versus—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Wellman Industries, Inc. respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on April 1, 1975.

OPINION BELOW

The Decision and Order of the National Labor Relations Board is reported at 211 NLRB No. 96 and is printed in Appendix A. The Opinion of the Fourth Circuit Court of Appeals, not yet officially reported, is printed in Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered April 1, 1975. A timely petition for rehearing en banc was denied May 22, 1975 and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

Whether the refusal of the National Labor Relations Board to afford an objecting party an evidentiary hearing to test the validity of a representation election constitutes a denial of due process of law and the right to counsel under the Fifth Amendment to the Constitution of the United States?

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, et al.) are as follows:

Representatives and Elections

* * * * *

Sec. 9. (c) (1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board–

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the person filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c).

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find

are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

* * * * *

National Labor Relations Board Rules and Regulations, Series 8, as amended:

Sec. 102.69 . . .

(c) If objections are filed to the conduct of the election or conduct affecting the result of the election, or if the challenged ballots are sufficient in number to affect the result of the election, the regional director shall, consistent with the provisions of section 102.69(d), investigate such objections or challenges, or both. . . . If the election has been conducted pursuant to a direction of election issued following any proceeding under section 102.67, the regional director may (1) issue a report on objections or challenged ballots, or both, as in the case of a consent election pursuant to subsection (b) of this section, or (2) exercise his authority to decide the case and issue a decision disposing of the issues and directing appropriate action or certifying the results of the election.

(d) The action of the regional director in issuing a report on objections or challenged ballots, or both, following proceedings under sections 102.62(b) or 102.67, or in issuing a decision on objections or challenged ballots, or both, following proceedings under section 102.67, may be on the basis of an administrative investigation or, if it appears to the regional director that substantial and material factual issues exist which, in the exercise of his reasonable discretion, he determines may more appropriately be resolved after a hearing, he shall issue and cause to be served on the parties a notice of hearing on said issues before a hearing officer. If the regional director issues a report on objectives and challenges, the parties shall have the rights set forth in subsections (c) and (f) of this section; if the regional director issues a decision, the parties shall have the rights set forth in section 102.67 to the extent consistent herewith."

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

"* * * nor shall any person * * * be deprived of life, liberty or property, without due process of law."

STATEMENT OF THE CASE

Wellman Industries, Inc., (Wellman), a manufacturer engaged in the production of wool and polyester fibre products, maintains its production plant in Johnsonville, South Carolina.

Pursuant to the filing of a Petition for Certification under Section 9(c) of the National Labor Relations Act (the Act), by the Textile Workers Union of America, AFL-CIO, CLU, (Union), the Regional Director for the Eleventh Region of the National Labor Relations Board (Board) on October 27, 1971 issued a Decision and Direction of Election (Appendix C) setting forth an appropriate unit for the purpose of collective bargaining. A representation election was conducted on November 17 and 18, 1971, and a majority of the eligible voters

rejected the Union as their bargaining representative by a vote of 499 to 488.

On November 26, 1971, the Union filed objections to conduct affecting the results of the election alleging in relevant part that "the employer through its agents, made misrepresentations which involved a substantial departure from the truth at a time when the (Union) had no opportunity at all to make a reply." As a result thereof, an ex parte investigation was conducted by the Eleventh Region.

On February 10, 1972, the Director for the Eleventh Region issued a Supplemental Decision, Order and Direction of Second Election (Appendix D) in which he ordered that the first election be set aside and that a second election be conducted. In relevant part, the Director ruled that it was "unnecessary to precisely determine when a handbill [entitled "Was the Union Afraid to Show This Contract] was distributed [by Wellman] because of the nature of the material contained therein, even the earliest date suggested, November 15, would have precluded an effective opportunity to reply." The Director found that the aforementioned handbill which purported to quote rates of pay of employees employed at the Textile Paper Products, Inc. plant in Hendersonville, North Carolina, was not factually accurate since the agreement from which various rates of pay were quoted, had been cancelled and superseded by a new agreement. In his Supplemental Decision, the Director ordered that a new election be conducted on the theory that the handbill contained "misrepresentations [which] were matters of vital concern to the voters, that the voters were not in a position to know the true facts and [that such misrepresentations] could reasonably be expected to have a substantial effect upon their choice of a bargaining representative."

Although the Supplemental Decision indicated the Director's opinions for setting aside the November election, said Decision failed to recite any factual nexus upon which the Director's coclusions may have been based. Specifically, there was no

indication that the Region interviewed any bargaining unit employees with regard to the publication of the handbill in issue or otherwise conducted any investigation among bargaining unit employees to ascertain the impact, if any, of said handbill upon their choice of bargaining representative.

A Request for Review of the Director's Decision was filed by Wellman with the Board on March 9, 1972 urging that it had been improperly denied a hearing and denied access to statements taken during the investigation in violation of the provisions of the Freedom of Information Act.

The Board on March 23, 1972, denied Wellman's request for review upon the ground that it raised no issues that would warrant a review.

A second representation election was held April 19 and 20, 1972, wherein the majority of voters (557 to 466) designated the Union as their bargaining representative. Wellman filed timely objections to the election, contending in relevant part that the Union (1) engaged in campaign trickery through the use of printed materials and other means of communication just prior to the election when Wellman had no opportunity to reply; (2) exerted repeated pressure on voters during the campaign which tended to create an atmosphere of fear; (3) engaged in a course of violence on or near company property creating an atmosphere of violence; and (4) handed out at the gate to its plant on April 19, 1972, at 8:00 a.m., on the date of the election, a four-page brochure which was intended to deceive the employees and to which the employer had no timely opportunity to reply.

Particularly, Wellman objected to the Union's having distributed, just prior to the second election, two leaflets respectively entitled "Special Union Meeting" (Appendix E) and "Wellman 'Double-Crossed' us on our Pay Raise" (Appendix E). The first of the aforesaid leaflets inaccurately charged that a personal real estate transaction of Company

President, John G. Wellman, had been financed with corporate funds earmarked to cover back wages allegedly due to employees. The second leaflet published by the Union contained blatant misrepresentations as to the reasons why Wellman withheld certain wage increases during Phases I and II of former President Nixon's wage-price freeze.

On June 14, 1972, the Director issued his Second Supplemental Decision and Certification of Representatives (Appendix E) overruling each of Wellman's objections. As a result of this decision the Union was certified as the bargaining representative for the Wellman employees.

On September 26, 1972, Wellman received a request from the Union to bargain and on October 4, 1972, replied by letter that it would not bargain due to the serious question concerning the validity of the Union's certification.

Upon the Union's filing of unfair labor charges, the issuance of a complaint, and the holding of an unfair labor practice hearing before an Administrative Law Judge, the Board on June 17, 1974 issued its Decision and Order (Appendix A) requiring Wellman to take certain affirmative action including recognizing and bargaining with the Union.

REASONS FOR GRANTING THE WRIT

The Order and Decision below conflicts with decisions of other Circuit Courts of Appeal as to the right of an objecting party to an evidentiary hearing to test the validity of a representation election conducted by the National Labor Relations Board.

As succinctly stated in *NLRB* v. *Bata Shoe Co.*, 377 F.2d 821 (4th Cir. 1967) cert. denied 389 U.S. 917:

> "Due process of law demands and the present Rules and Regulations of the Labor Board provide that where there is a substantial and material issue of fact relating to the validity of a representation election that a hearing be conducted *at some stage* of the administrative proceeding before the objecting party's rights can be affected by an enforcement order."

THE FIRST ELECTION

The Regional Dirdctor, having conducted only an ex parte administrative investigation of the Union's objections to the November 1971 election concluded that a Company handbill entitled, "Was the Union Afraid to Show This Contract," (which handbill referred to the wage rates of employees of Textile Paper Products, Inc.), contained ". . . misrepresentations. . . of vital concern to the voters, that the voters were not in a position to know the true facts, and [that such misrepresentations] could reasonably be expected to have a substantial effect upon the employees choice of a bargaining representative." However, none of these conclusions were supported by any finding of fact contained in the Director's Decision.

Specifically, the Director failed to take into account or otherwise consider the extent to which Wellman could reasonably be viewed by its employees to have known the terms of the Textile Paper Products Inc. collective bargaining agreement. *Hollywood Ceramics Company*, 140 N.L.R.B. 221.

Further, no consideration was given by the Director to the fact that Wellman may well have been justified in relying upon and publishing wage rates set forth in an agreement which was then not due to expire until June, 1973, and which agreement contained a broad "zipper" clause (" entire agreement clause").

At no point in his Decision did the Director provide an inkling as to how he determined or otherwise arrived at his "opinion" that the Union did not have adequate time to reply to Wellman's handbill. This conclusion stands unexplained although it would appear uncontroverted that the Union waged

a vigorous election campaign employing various communication devices, including the use of continuous telephone message recordings. Likewise, the Director failed to indicate how many, if any, bargaining unit employees were questioned as to whether they (a) read the handbill; (b) had independent knowledge of the terms of the Textile Paper Products Inc. collective bargaining agreement; and (c) considered the handbill of vital or any concern in connection with the forthcoming Wellman election.

Most significantly, the Director failed to establish that his Region had conducted an investigation to "ascertain the impact," if any, of the handbill upon Wellman's employees' choice of a bargaining representative.

A close examination of the Director's Decision, reveals that rather than securing hard core facts, the Director instead chose to assume that Wellman's handbill (Appendix D) contained misrepresentations which had a substantial impact or effect upon Wellman's employees' choice of a bargaining representative. Such a conclusion is not supported by any published findings of fact and raises a "substantial and material factual issue" as to the employees exercise of a free choice of bargaining representative.

In *Henderson Trumbull Supply Corp.* v. *N.L.R.B.*, 86 LRRM 3121 (2d Cir. 1974), the Second Circuit ordered a hearing on objections, where as here, the Director failed to hold a hearing to resolve substantial and material factual issues and otherwise failed to "ascertain the impact," if any, of certain election campaign propaganda by inquiring whether any bargaining unit employees had been influenced by such propaganda *N.L.R.B.* v. *Janler Plastic Mold Corp.* 82 LRRM 2175 (7th Cir. 1972).

Similarly, in the recent case of *Argus Optics* v. *N.L.R.B.*, 89 LRRM 2280 (6th Cir. 1975), the Sixth Circuit ordered that an evidentiary hearing be held to determine whether (1) a certain "... letter sent by the Union to Argus Optics employees misrepresented the profitability of the plant" and (2) certain

alleged Union misconduct, "had a significant impact on the election."

Surely, where as here, substantial and material factual issues exist as to the handbill and its "impact," if any, upon the collective bargaining choices of unit employees, the parties as a matter of law should be afforded the opportunity of a hearing on objections to present evidence, to confront and cross-examine witnesses and present oral argument. *N.L.R.B.* v. *Bata Shoe Co., supra; N.L.R.B.* v. *Janler Plastic Mold Corp., supra;* and *Henderson Trumbull Supply Co.* v. *N.L.R.B. supra.*

The readily apparent factual shortcoming of the Director's Decision coupled with (a) the refusal to provide Wellman's Counsel with those documents, affidavits and other materials which may have formed the basis of the Region's *ex parte* investigation; and (b) the denial of a hearing on objections, in a situation where substantial and material issues of fact have been raised, constitutes a denial of due process of law secured by the Fifth Amendment to the United States Constitution, *N.L.R.B.* v. *Bata Shoe Co., supra.*

THE SECOND ELECTION

A review of the Director's Second Supplemental Decision and Certification of Representatives (Appendix E) reveals that material and substantial factual issues presented in Wellman's objections to the second election were cavalierly dismissed.

Wellman asserts that the Union published substantial and material misrepresentations by (a) its distribution on April 17 and 18 of a handbill entitled "Special Union Meeting," (Appendix E) and (b) by means of a telephonic message on April 18 at a time when the Company did not have sufficient opportunity to reply. Specifically, Wellman contends that the handbill and telephonic message indicated to employees that a

personal real estate transaction of Company President, John G. Wellman was financed by corporate funds accumulated by denying employees back wages for the period of the wage-price freeze of 1971. The Union in its handbill sought to and did in fact, treat John G. Wellman and the Wellman corporation as indistinguishable entities. Specifically, the Union's handbill stated:

> **"IS THIS WHERE YOUR BACK PAY WENT?"**
>
> **$$$$$$$$$**
>
> "Big" Jack (G) for $Goldmine$ Wellman just bought a Two
>
> **$$$$$$$$$**
>
> Hundred Eighty Five Thousand ($285,000) House and Plantation on January 11, 1972 of this year.
>
> *** * * * * * * * * * * * ***
>
> "It seems to us if the president of Wellman Industries can buy himself a $285,000 Plantation and House he could certainly have afforded to pay us our thirteen (13) weeks back pay from August 15 through November 15, 1971."

For the Union to have charged John G. Wellman with utilizing corporate funds in connection with a personal real estate transaction was a gross misrepresentation departing substantially from the truth. In point of fact, the aforesaid real estate transaction was secured by means of a substantial mortgage given to John G. Wellman, individually, as mortgagor. As this misrepresentation was continuously published by the Union on the eve of the election, Wellman had no time to make an effective reply and such misrepresentation of fact must surely have had a substantial impact on the election results.

Here, as in the strikingly similar *Henderson Trumbull Supply Corp. case, supra,* the Union on the eve of the election leveled an *ad hominem* accusation putting in issue the source and the amount of money spent by a highly placed corporate official in

connection with a personal real estate transaction. Despite Wellman's explanation of the real estate transaction, the Director made no attempt to determine the impact of the Union's misrepresentations on the election.

Rather than analyzing the competing assertions involving the aforesaid real estate transaction, the Director took the position that the Union's assertions concerning said real estate transaction amounted to nothing more than "permissible election propaganda" which employees could evaluate for themselves.

Significantly, the Director failed to ascertain the meaning attributed to such assertions by Wellman's employees, *N.L.R.B.* v. *Janler Plastic Mold Corp., supra,* and more importantly, failed to determine the "impact" of this misrepresentation upon the election. *Henderson Trumbull Supply Corp.* v. *N.L.R.B., supra; Gulton Industries Inc.* v. *N.L.R.B.* 469 F2d 1371 (5th Cir. 1972).

In *Argus Optics* v. *N.L.R.B., supra,* the Sixth Circuit, having reviewed such cases as *Henderson Trumball Supply Corp., supra; N.L.R.B.* v. *G.K. Turner Associates,* 457 Fed. 484 (9th Cir. 1972) and *Tyler Pipe and Foundry Co.* v. *N.L.R.B.,* 406 Fed. 1272 (5th Cir. 1969), ordered that a hearing be held to resolve certain substantial and factual issues. The Court, quoting from *G.K. Turner Associates, supra,* at 488, observed that *"[m]isrepresentation about company profitably can be material, since the extent to which employees share equitably in the products of their labor may be of great interest to them."*

Here, as in *Argus Optics, supra,* the Union's pre-election misrepresentation concerning John G. Wellman's alleged misutilization of corporate funds was material since the apportionment of corporate funds is of substantial and crucial concern to all employees.

Clearly, the Union's misrepresentation with respect to a material, factual issue required the holding of a hearing on

objections. The failure of the N.L.R.B. and the Fourth Circuit to have ordered the Region to hold a hearing is contrary to the aforementioned Second, Fifth, Sixth and Ninth Circuit cases.

Regarding the further objections to the second election, Wellman also challenges the Union's dissemination, on the eve of the election, of a leaflet entitled "Wellman 'Double-Crossed' Us On Our Pay Raise!" (Appendix E). Although this leaflet contained blatant misrepresentations as to the reasons for Wellman's withholding of a promised wage increase during Phases I and II of President Nixon's wage-price freeze, the Director merely chose to treat the contents of the leaflet as "permissible election propaganda." In this regard, the Director made no effort to evaluate the truth or falsity of the statements contained in the leaflet. Nor does it appear that the Region investigated "the impact", if any, of said leaflet upon the bargaining unit employees. *Henderson Trumbull Supply Corp.* v. *N.L.R.B., supra; Argus Optics* v. *N.L.R.B., supra.*

Inasmuch as the handbill entitled, "Wellman 'Double Crossed' Us On Our Pay Raise" contained serious misrepresentations of facts as to the deferral of employee wage increases due to the strictures of the 1971-1972 wage-price freeze guidelines, substantial and material factual issues were raised which warranted the holding of a hearing. As in *Henderson Trumbull, supra,* and *Argus Optics, supra* the Director herein erred in assuming given the complicated nature of the then existing wage-price guidelines, that employees would have the necessary expertise to evaluate the Union's misrepresentations.

As previously urged in connection with the first election, where as here, there are substantial and material issues of fact, the Board as a matter of law must afford the parties an evidentiary hearing. *Bata Shoe Co., supra; Henderson Trumbull Supply Corp., supra;* and *Argus Optics, supra; N.L.R.B.* v. *Mr. Fine, Inc.,* 89 LRRM 2974 (5th Cir. 1975).

CONCLUSION

For the foregoing reasons, Wellman Industries, Inc. respectfully prays that this Petition for Certiorari be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

Decision and Order of NLRB
(Dated June 17, 1974)

JKP
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211 NLRB No. 96

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases 11—CA—5091,
11—CA—5101, and
11—CA—5233

WELLMAN INDUSTRIES, INC.,

and

TEXTILE WORKERS UNION OF AMERICA, AFL—CIO, CLC.

DECISION AND ORDER

On October 15, 1973, Administrative Law Judge Lowell Goerlich issued the attached Decision in the above-entitled matter in which he recommended that the Respondent's defense based on the testimony of Baxley be denied. Additionally, he found that the Respondent had made the unilateral changes alleged in Cases 11—CA—5101 and 11—CA—5233, and concluded by stating, "it is recommended that, if an order to bargain is entered in Case 11—CA—5091, an order also be entered in these cases, with an ap-

propriate notice, ordering the employer to cease and desist from making unilateral changes in wages, hours, and working conditions of its unit employees without prior notification to and consultation with the Union." Thereafter, the General Counsel filed exceptions[1] and a supporting brief and simultaneously filed a motion stating that: "In the event that the Board finds that the Administrative Law Judge did not have to make appropriate findings of fact, conclusions of law and write a remedial order together with an appropriate notice to employees," the Board grant a bargaining order together with appropriate relief in these cases. The Petitioner, herein Charging Party, filed exceptions and a supporting brief and the Respondent filed exceptions and a supporting brief. Subsequently, the Charging Party filed a reply brief to the Respondent's exceptions

[1] The General Counsel excepted as follows:

1. To the Administrative Law Judge's failure to make conclusions of law, findings of fact, and to recommend an order in Case 11—CA—5091.

2. To the Administrative Law Judge's failure to make conclusions of law, findings of fact, and to recommend an order in Case 11—CA—5101.

3. To the Administrative Law Judge's failure to make conclusions of law, findings of fact, and to recommend an order in Case 11—CA—5233.

4. To the Administrative Law Judge's failure to recommend a bargaining order in Case 11—CA—5091.

5. To the Administrative Law Judge's failure to recommend that Respondent cease and desist from making unilateral changes in terms and conditions of employment of its employees in the bargaining unit without prior consultation and bargaining with the Union in Cases 11—5101 and 11—CA—5233.

6. To the Administrative Law Judge's failure to direct that Respondent post a proper Notice to Employees in Cases 11—CA—5091, 11—CA—5101, and 11—CA—5233.

and the Respondent filed a "Resistance to Motion" that had been filed by the General Counsel.

On April 19 and 20, 1972, a secret ballot election was conducted at Respondent's plant under the supervision of the Regional Director for Region 11 of the Board. The Union received a majority of the valid votes cast in that election. On April 25, 1972, Respondent timely filed its Objections and Supplemental Objections to conduct affecting the results of the election of April 19 and 20, 1972. On June 14, 1972, the Regional Director issued a Second Supplemental Decision and Certification of Representative in which he overruled Respondent's Objections and Supplemental Objections and formally certified the Union as the exclusive representative of Respondent's employees. On July 10, 1972, the Respondent filed with the Board a Request for Review of the Regional Director's Second Supplemental Decision and Certification of Representative. On August 1, 1972, the Board issued an Order Denying Respondent's Request for Review. On September 26, 1972, the Union requested that Respondent meet with it for the purpose of conducting bargaining negotiations. On October 4, 1972, the Respondent informed the Union that it would refuse to bargain.

On October 5 and 13, 1972, the Charging Party filed a charge and an amended charge in Case 11—CA—5091 alleging that Respondent had refused to bargain with it in violation of Section 8(a)(1) and (5) of the Act. After a complaint and notice of hearing issued in that case on October 20, 1972, and Respondent filed its answer thereto on November 3, 1972, counsel for General Counsel on November 9, 1972, filed a Motion to Strike Affirmative Defense, Portions of Answer, and for Summary Judgment.

On March 8, 1973, Respondent filed its Motion to Deny General Counsel's Motion for Summary Judgment due to newly discovered evidence. The newly discovered evidence involved three affidavits from one Kenneth Baxley concerning his activities immediately prior to the April 1972 election.

On May 30, 1973, the Board issued an Order denying General Counsel's Motion for Summary Judgment and Remanding Proceeding to Regional Director for Hearing. It further ordered that "a hearing before a duly designated Administrative Law Judge to be designated by the Chief, Division of Judges, for the purpose of taking evidence limited to the allegation of newly discovered evidence relating to the information contained in the Baxley affidavits." The Board further ordered that upon conclusion of the hearing which it had directed the Administrative Law Judge "shall prepare and serve upon the parties a Decision containing findings of fact, conclusions of Law, and recommendations based upon the evidence received pursuant to the provisions of this Order, and that following service of such Decision upon the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable."

Subsequent to the Board's May 30, 1973, Order, the Acting Regional Director for Region 11 issued his Order Consolidating Cases on June 7, 1973, in which he consolidated Cases 11—CA—5101 and 11—CA—5233 with Case 11—CA—5091 for hearing. Cases 11—CA—5101 and 11—CA—5233 involved allegations of unilateral changes in violation of Section 8(a)(5) made by Respondent subsequent to the Union's certification.

On August 13 and 14, 1973, a hearing was conducted before Administrative Law Judge Lowell Goerlich on all three cases. Administrative Law Judge Goerlich heard extensive testimony presented by both Respondent and counsel for the General Counsel concerning the Baxley affidavits and the evidence contained therein and the alleged unilateral changes made by Respondent. He did not credit the testimony adduced by Respondent and as noted above, stated, "Accordingly, based upon the evidence received and an examination of the record as a whole, it is recommended that the Respondent's defense planted on the testimony of Baxley be denied." Additionally, he found that Respondent had made the alleged unilateral changes but as noted above he did not recommend an order in any of the cases involved in the consolidated complaint.

On January 31, 1974, the Board found that the Board's Remand Order of May 30, 1973, constituted a total remand of Case 11—CA—5091 and instructed the Administrative Law Judge to issue a decision "containing findings of fact, conclusions of law and recommendations." Accordingly, the cases were remanded to the Administrative Law Judge for further proceedings consistent with the Board Order, including the preparation and issuance of a Supplemental Decision setting forth findings of fact, conclusions of law, and recommendations in conformity with the Board's Rules and Regulations.

On February 28, 1974, Administrative Law Judge Goerlich issued the attached Supplemental Decision in this proceeding. Thereafter, Respondent filed a Motion to Reopen Hearing with attached affidavits, exceptions to the Decisions of the Administrative Law Judge, and a supporting brief. The Charging Party filed a letter and attached its

exceptions which were filed November 16, 1973, as its exceptions and brief in support of the Supplemental Decision of the Administrative Law Judge. The Respondent filed an answering brief to the exceptions and brief of the Charging Party. The General Counsel filed an Opposition to Respondent's Motion to Reopen Hearing and a Motion to Strike Affidavits attached to Respondent's Motion to Reopen Hearing. The Respondent filed a Motion to Strike Portion of General Counsel's Opposition to Motion.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision and Supplemental Decision in light of the exceptions, briefs, and motions,[2] and has decided to affirm the rulings, findings, and conclusions of the Administrative

[2] The Respondent's Motion to Reopen Hearing requests the Board to issue an order remanding this matter to the Administrative Law Judge requiring that the hearings previously held herein be reopened for the purpose of taking testimony with respect to the credibility of witness Baxley. More specifically the motion states, *inter alia*, "The Respondent believes that it has important evidence with respect to the credibility of the said Baxley as more particularly set forth in the affidavits annexed hereto and incorporated herein . . . [t]hat the evidence with respect to said Baxley was not properly in issue before this time, and, therefore constitutes new evidence." General Counsel's Opposition to Motion to Reopen Hearing and Motion to Strike states, at par. 3:

> On March 15, 1974, after denial of its Motion by the Administrative Law Judge, Respondent filed its Motion to Reopen Hearing with the National Labor Relations Board. This Motion was based on grounds identical to those given in the Motion set forth in (2), above.

The Respondent filed a subsequent motion submitting that since the Administrative Law Judge ruled on the motion almost 2 weeks after the Board had ordered the proceeding transferred to itself, the Administrative Law Judge was without power or authority

Law Judge and to adopt the recommended Order in his Supplemental Decision and, those findings and conclusions set forth in his Supplemental Decision, and further to adopt his conclusions in his initial Decision to the extent that they are not inconsistent with the Board's Order of January 31, 1974.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Supplemental Order of the Administrative Law Judge and hereby orders that Respondent, Wellman Industries, Inc., Johnsonville, South Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the said Supplemental Order.

Dated, Washington, D.C. Jun 17 1974

Howard Jenkins, Jr., Member
Ralph E. Kennedy, Member
John A. Penello, Member

NATIONAL LABOR RELATIONS BOARD

(Seal)

to rule on Respondent's Motion to Reopen Hearing, and requested the Board to take no notice of the Administrative Law Judge's ruling to deny Respondent's motion.

We have considered the Respondent's Motion to Reopen Hearing and General Counsel's opposition thereto *de novo*. We find no merit in Respondent's Motion to Reopen Hearing and we hereby deny it. We note, *inter alia*, that the proper occasion for the presentation of evidence bearing on the credibility of Baxley, who was Respondent's chief witness, was at the hearing conducted on August 13 and 14, 1973, before the Administrative Law Judge. We note further that there is nothing in Respondent's motion which would indicate why the alleged evidence bearing on Baxley's credibility was not available to Respondent at the time of the hearing in this matter.

Administrative Law Judge's Supplemental Decision
(Dated February 28, 1974)

JD—97—74
Johnsonville, S.C.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

Cases 11-CA-5091
11-CA-5101
11-CA-5233

WELLMAN INDUSTRIES, INC.,

and

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO, CLC.

CHARLES M. WILLIAMSON, Esq., and
ARVID LESEMANN, Esq.,
of Winston-Salem, N.C.,
for the General Counsel.

PHILLIP POPE,
of Andrews, S.C., and
ESTES RIFFE,
of Charleston, S.C.,
for the Charging Party.

Administrative Law Judge's Supplemental Decision

PETER D. HYMAN, Esq.,
of Florence, S.C., and
GERALD J. BARRE, Esq.,
of Great Neck, N.Y.,
for the Respondent.

SUPPLEMENTAL DECISION

Statement of the Case

LOWELL GOERLICH, Administrative Law Judge: On October 15, 1973, the Administrative Law Judge's Decision was issued in this matter. Thereafter, on January 31, 1974, the Board remanded the cases to the Administrative Law Judge and ordered: "It is hereby ordered that these above-entitled cases be, and they hereby are, remanded to the Administrative Law Judge for further proceedings consistent with this Order, including the preparation and issuance of a Supplemental Decision setting forth findings of fact, conclusions of law and recommendations in conformity with the Board's Rules and Regulations."

FINDINGS OF FACT,[1]
CONCLUSIONS AND REASONS THEREFOR

Case 11-CA-5091

The Respondent's Defenses

The complaint in Case 11-CA-5091 charges that after the certification of the Textile Workers Union of America, AFL-CIO, CLC (herein referred to as the Union), as exclu-

[1] The findings of fact are based upon the admissions and the record as a whole.

sive bargaining representative on June 14, 1972, the Respondent refused to bargain with said Union by a letter dated October 4, 1972, to wit: "We seriously question the validity of your certification by the NLRB as the exclusive bargaining representative of our productive employees."

The Respondent answered denying that the Union was the exclusive bargaining representative by virtue of Section 9(a) of the National Labor Relations Act, as amended (herein referred to as the Act), and that it had violated Section 8(a)(1) and (5) of the Act. The respondent admitted all other allegations.

As affirmative defenses the Respondent plead:

> 3. On June 14, 1972, the Regional Director of the 11th Region of the Board issued his second supplemental decision and certification of representative in which he, *inter alia,* formally certified the Union as the exclusive representative for the purpose of collective bargaining of the employees in the appropriate unit as described in paragraph 7 of the complaint.
>
> 4. By letter dated September 26, 1972, the Union requested that the respondent meet with it for the purpose of conducting collective bargaining negotiations with respect to the employees in the Unit described in paragraph 7 of the complaint.
>
> 5. The Union, by the acts described in paragraphs 3 and 4 above and by each of said acts, did engage in and is engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act and has thereby waived any right to relief thereunder.

> 6. The Union, by the acts described in paragraphs 3 and 4 above and by each of said acts, did engage in and is engaging in unfair labor practices within the meaning of Section 8(b)(3) of the Act and has thereby waived any right to relief thereunder.

Nothing is alleged in these defenses which requires a hearing or constitutes a defense to the allegations of the violation of Section 8(a)(1) and (5) of the Act. In this regard it is the Respondent's contention that a union which fails to fulfill its bargaining obligation "by not seeking collective bargaining for almost 15 weeks after it was certified by the Regional Director" has violated Section 8(b)(3) of the Act and has also restrained and coerced Respondent's employees within the meaning of Section 8(b)(1)(A) of the Act. It was not unreasonable nor did the Union by such delay disclose an abandonment of or a failure to fulfill its bargaining obligations when it waited to commence bargaining until after the Board issued its Order denying Respondent's Request for Review of Second Supplemental Decision and Certification of Representative on August 1, 1972. Moreover, the Respondent's obligation to bargain commenced not later than the date of the certification, June 14, 1972 (see Section 5(a) of the Act), after which the Union was entitled to the normal presumption of majority status for a period of 1 year. *Ray Brooks* v. *N.L.R.B.*, 348 U.S. 96. Indeed, had the Union made an earlier request for bargaining it would have been a futile gesture since the Respondent, by its insistence on an appeal to the Board and by its letter of October 4, 1972, questioning the validity of the certification, disclosed an adamant disposition not to

assume its bargaining obligations. Thus the Respondent ought not to be relieved of its obligation to bargain when its claim for such relief is grounded on its own refusal to bargain.

These affirmative defenses are not well taken and are not sustained.

A further defense was advanced by the Respondent at the hearing in these cases which was held on August 14 and 15, 1973. This hearing was pursuant to the Board's Order that "a hearing be held before a duly designated Administrative Law Judge to be designated by the Chief, Division of Judges, for the purpose of taking evidence limited to the allegation of newly discovered evidence relating to the information contained in the Baxley affidavits." The Baxley affidavits related to the Respondent's claims that there had been unlawful interference with the second election held on April 19 and 20, 1972, and that by reason thereof the Respondent was relieved of the binding effect of the Certification of Representative in Case 11-RC-3365. In the Decision issued in this case on October 15, 1973, it was found that "Baxley was an unreliable witness" and his testimony did "not support a finding that a telegram, leaflet, and telephonic message [disseminated during the second election campaign] contained the misrepresentations claimed by the Respondent. . . . based upon the evidence received and an examination of the record as a whole, it [was] recommended that the Respondent's defense planted on the testimony of Baxley be denied."

Thus any alleged defense of the Respondent derived from a claim of newly discovered evidence is not well taken and is not sustained.

By denying that the Union was the exclusive bargaining representative by virtue of Section 9(a) of the Act the Respondent in effect attacked the validity of the certification issued on June 14, 1972.

On October 27, 1971, the Regional Director for Region 11 of the Board issued a Decision and Direction of Election in Case 11-RC-3365 in which he found "All production and maintenance employees including laboratory technicians, plant clerical employees, scheduler and followup man, process control technicians, maintenance technician and quality control technicians employed at the Employer's Johnsonville, South Carolina, plant, excluding office clerical employees, professional employees, sales personnel, seasonal employees, messenger and mail clerk, fabric designer, watchman, guards and supervisors as defined in the Act" to be an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

On November 17 and 18, 1971, a secret ballot election in the unit set forth above was conducted under the supervision of the Regional Director for Region 11 of the Board.

On November 26, 1971, the Union filed timely Objections to Conduct Affecting the Results of the Election on November 17 and 18, 1971. On February 10, 1972, the Regional Director of Region 11 of the Board issued his Supplemental Decision, Order, and Direction of Second Election in which he, *inter alia*, directed that the election of November 17 and 18, 1971, be set aside and that a new election be conducted. On March 9, 1972, the Respondent filed its Request for Review of Supplemental Decision, Order, and Direction of Second Election with the Board. On or about March 23, 1972, the Board issued its Order denying the Respondent's

Request for Review of Supplemental Decision, Order, and Direction of Second Election.

On April 19 and 20, 1972, a majority of the employees in the unit described above, by a secret ballot election conducted under the supervision of the Regional Director of Region 11 of the Board, designated and selected the Union as their representative for the purpose of collective bargaining with Respondent, with respect to rates of pay, wages, hours of work, and other terms and conditions of employment.

On April 25, 1972, Respondent filed its Objections and Supplemental Objections to Conduct Affecting the Results of the Election of April 19 and 20, 1972. On June 14, 1972, the Regional Director of Region 11 of the Board issued his Second Supplemental Decision and Certification of Representative in which he, *inter alia,* overruled Respondent's Objections and Supplemental Objections to Conduct Affecting the Results of the Election of April 19 and 20, 1972, and formally certified the Union as the exclusive representative for the purpose of collective bargaining of the employees in the appropriate unit described above. On or about July 10, 1972, the Respondent filed with the Board its Request for Review of Second Supplemental Decision and Certification of Representative. On or about July 17, 1972, the Respondent filed with the Regional Director of Region 11 of the Board its Motion to Reconsider Second Supplemental Decision and Certification of Representative. On July 21, 1972, the Regional Director of Region 11 of the Board issued his Order Denying Motion for Reconsideration of his Second Supplemental Decision and Certification of Representative. On August 1, 1972, the Board issued its Order

denying Respondent's Request for Review of Second Supplemental Decision and Certification of Representative.

Thus, the Board affirmed the certification issued on June 14, 1972, and the Respondent, by attacking the legal effect or validity of the Certification of Representative, is attempting to relitigate the same issues which it raised and litigated in the prior representation proceeding, Case 11-RC-3365.

"It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding."[2]

All the remaining issues raised by the Respondent in the proceeding have been litigated in the prior representation proceeding and all alleged newly discovered evidence has been considered. There are no special circumstances at this time requiring a reexamination of the representation case. Thus the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding.

I. The Business of the Respondent

Respondent is now, and has been at all times material herein, a Delaware corporation engaged in the manufacture of wool and synthetic fiber products. Respondent owns and operates a plant at Johnsonville, South Carolina, which is the only plant involved in this proceeding.

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[2] *Kalvar Corporation,* 207 NLRB No. 115.

Respondent, during the past 12 months, which period is representative of all times material herein, manufactured, sold, and directly shipped from its Johnsonville, South Carolina, plant, goods of a value in excess of $50,000 to points and places outside the State of South Carolina. During the same period of time, Respondent caused to be shipped directly to its Johnsonville, South Carolina, plant, goods and raw materials of a value in excess of $50,000 from points and places outside the State of South Carolina.

Respondent is now, and has been been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Representation Proceeding*

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All production and maintenance employees including laboratory technicians, plant clerical employees, scheduler and followup man, process control technicians, maintenance technician and quality control technicians employed at the Employer's Johnsonville, South Carolina, plant, excluding office clerical employees, professional employees, sales personnel, seasonal employees, messenger and mail clerk, fabric designer, watchmen, guards and supervisors as defined in the Act.

2. The certification

On April 19 and 20, 1972, a majority of the employees in the appropriate unit, by a secret ballot election conducted under the supervision of the Regional Director of Region 11 of the Board, designated and selected the Union as their representative for the purpose of collective bargaining with Respondent, with respect to rates of pay, wages, hours of work, and other terms and conditions of employment; and on June 14, 1972, the Regional Director certified the Union as the exclusive collective-bargaining representative of the employees in the said unit.

At all times since April 20, 1972, and continuing to date, the Union has been the representative for the purpose of collective bargaining of the employees in the unit described above, by virtue of Section 9(a) of the Act.

B. *Respondent's Refusal to Bargain*

Commencing on April 20, 1972, and at all times thereafter, the Respondent has been obligated to bargain collectively with the Union as the exclusive bargaining representative of all the employees in the above-described unit. The Respondent has failed and refused to assume such responsibility in violation of Section 8(a)(5) of the Act.

Administrative Law Judge's Supplemental Decision

Cases 10-CA-5101 and 11-CA-5233

In the prior decision in these cases, after trial on August 13 and 14, 1973, it was found:

> In Cases 11-CA-5101 and 11-CA-5233, the General Counsel offered evidence that the Respondent unilaterally and without prior notification to, or consultation with, the Union granted a wage increase to unit employees on October 2, 1972, laid off unit employees on August 27, 1972, and promulgated new absence and tardiness rules and regulations on January 29, 1973. Personnel Director Matthews admitted that attendance rules were changed to reflect the points attached to the number of absences, instances of tardiness, excused absences, and unexcused absences. Matthews also admitted the changes in work schedules and the laying off of employees on August 25, 1972. These changes were unilateral without notification to or consultation with the Union.

Thus the General Counsel's consolidated complaint is sustained.[3]

Conclusions of Law

1. Wellman Industries, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and it will effectuate the purposes of the Act for jurisdiction to be exercised herein.

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[3] The Respondent's First, Second, and Third affirmative defenses in these cases, which are similar to the defenses raised in Case 11—CA—5901, are not sustained for the same reasons.

Administrative Law Judge's Supplemental Decision

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees including laboratory technicians, plant clerical employees, scheduler and followup man, process control technicians, maintenance technician and quality control technicians employed at the Employer's Johnsonville, South Carolina, plant, excluding office clerical employees, professional employees, sales personnel, seasonal employees, messenger and mail clerk, fabric designer, watchmen, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

4. Since April 20, 1972, the above-mentioned labor organization has been and now is the exclusive representative for the purposes of collective bargaining in the aforesaid appropriate unit within the meaning of Section 9(a) of the Act.

5. By unilaterally granting a wage increase to unit employees on October 2, 1972, laying off unit employees on August 27, 1972, and promulgating new absence and tardiness rules and regulations on January 29, 1973, the Respondent violated Section 8(a)(5) of the Act.

6. By refusing to bargain on October 2, 1972, August 27, 1972, September 26, 1972, and January 29, 1973, and at all times thereafter, with the above-named labor organization as the exclusive bargaining representative of all employees of the Respondent in the appropriate unit, Respondent has engaged and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

7. By the aforesaid refusals to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Recommended Remedy

Having found that the Respondent has engaged and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, it is recommended that it be ordered to cease and desist therefrom and bargain collectively with the Union as exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, the initial period of certification shall begin on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785; *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229, enfd. 328 F.2d 600 (C.A. 5), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421, enfd. 350 F.2d 57 (C.A. 10).

Accordingly, upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, it is recommended that the Board issue the following:

ORDER[4]

Respondent Wellman Industries, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Textile Workers Union of America, AFL-CIO, CLC, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees including laboratory technicians, plant clerical employees, scheduler and followup man, process control technicians, maintenance technician and quality control technicians employed at the Employer's Johnsonville, South Carolina, plant, excluding office clerical employees, professional employees, sales personnel, seasonal employees, messenger and mail clerk, fabric designer, watchmen, guards and supervisors as defined in the Act.

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[4] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

(b) Unilaterally changing working conditions of its employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Johnsonville, South Carolina, plant, copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 11, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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[5] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(c) Notify the Regional Director for Region 11, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated at Washington, D.C., Feb. 28, 1974

LOWELL GOERLICH
Administrative Law Judge

Administrative Law Judge's Decision
(Dated October 15, 1973)

JD—624—73
Johnsonville, S.C.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Division of Judges
Washington, D.C.

Cases 11—CA—5091
11—CA—5101
11—CA—5233

WELLMAN INDUSTRIES, INC.

and

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO, CLC

Charles M. Williamson, Esq.,
and *Arvid Lesemann, Esq.*,
of Winston-Salem, N.C.,
for the General Counsel.

Phillip Pope of Andrews, S.C.,
and *Estes Riffe*, of
Charleston, S.C., for the
Charging Party.

Peter D. Hyman, Esq., of
Florence, S.C., and *Gerald*
J. Barre, Esq., of Great
Neck, N.Y., for the
Respondent.

DECISION

Statement of the Case

LOWELL GOERLICH, Administrative Law Judge: On April 10, 1973, the Regional Director issued his Order Consolidating Cases, Consolidated Complaint and Notice of Hearing in Cases 11—CA—5101 and 11—CA—5233. On May 30, 1973, the National Labor Relations Board, herein referred to as the Board, in Case 11—CA—5091, issued its Order Denying General Counsel's Motion for Summary Judgment and Remanding Proceeding to Regional Director for Hearing. On June 7, 1973, the Regional Director issued an order consolidating Case 11—CA—5091 with Cases 11—CA—5101 and 11—CA—5223 for hearing. In the complaint in Case 11—CA—5091, it was charged that Wellman Industries, Inc., the Respondent herein, by letter dated October 4, 1972, refused to bargain with Textile Workers Union of America, AFL-CIO, CLC, herein called the Union, which had been certified as the exclusive bargaining representative on June 14, 1972, because "We seriously question the validity of your Certification by the NLRB as the exclusive bargaining representative of our production and maintenance employees." In the consolidated complaint in Cases 11—CA—5101 and 11—CA—5233, it was alleged that the Respondent violated Section 8(a)(5) of the National Labor Relations Act, as amended, herein referred to as the Act, by unilaterally and without prior notification to or consultation with the Union granting wage increases to unit employees on October 2, 1972, laying off unit employees on August 27, 1972, and promulgating new absence and tardiness rules and regulations on January 29, 1973.

The Respondent filed timely answers denying that it had engaged in or was engaging in the unfair labor practices alleged.

On November 10, 1972, the General Counsel in Case 11—CA—5091 had filed his Motion to Strike Affirmative Defenses, Portion of Answer, and for Summary Judgment with the Board. Thereafter, the Respondent filed a Motion to Deny General Counsel's Motion for Summary Judgment due to newly discovered evidence, attaching thereto an affidavit of Kenneth Baxley. The Board denied the General Counsel's Motion for Summary Judgment and held that "factual matters relating to the activities and prior statements of Baxley are now in dispute which can best be resolved by a hearing."

It was ordered that "a hearing be held before a duly designated Administrative Law Judge . . . for the purpose of taking evidence limited to the allegation of newly discovered evidence relating to the information contained in the Baxley affidavits."[1] A Baxley affidavit indicates that during the election campaign in April 1972 Baxley misrepresented the shooting of his dog and that during the same campaign he affixed a threatening note to his own door while, in fact, he had misrepresented that the note had been placed there by another.

The Respondent, by answer, admitted that at all times material herein it was an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union was a labor organization within the meaning of Section 2(5) of the Act.

Pursuant to the Board's Order in Case 11—CA—5091, Case 11—CA—5091 and consolidated Cases 11—CA—5101

[1] The Board's Order Denying General Counsel's Motion for Summary Judgment and Remanding Proceeding to Regional Director for Hearing further provided: ". . . upon conclusion of the hearing, the Administrative Law Judge shall prepare and serve upon the parties a Decision containing findings of fact, conclusions of law, and recommendations based upon the evidence received pursuant to the provisions of this order . . . ."

and 11—CA—5233 came on for trial on August 13 and 14, 1973, at Florence, South Carolina. Each party was afforded a full opportunity to be heard, to call, examine and cross-examine witnesses, to argue orally on the record, to submit proposed findings of fact and conclusions, and to file briefs. All briefs have been carefully considered.

Findings of Fact,[2] Conclusions, and Reasons Therefor

I. Case 11—CA—5091

A. *Pertinent Facts*

George Kenneth Baxley, age 24, was employed by the Respondent part time while he was in high school. He commenced full-time work in 1967. Thereafter, he worked during several separate tenures, quitting in March 1973 because he objected to Sunday assignments. Prior to the election campaign which culminated in an election on April 19 and 20, 1972, Baxley did not favor the Union and spoke against it. About 45 days before the election, Union Representative Estes Vernon Riffe converted Baxley to the union cause during a 2-hour discussion. Prior to this time, Baxley had been "strongly against the union." After his conversion to the union cause, Baxley solicited for the

[2] The facts found herein are based on the record as a whole and the observations of the witnesses. The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *N.L.R.B.* v. *Walton Manufacturing Company & Loganville Pants Co.*, 369 U.S. 404, 408. As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with the testimony of credible witnesses or because it is in and of itself incredulous and unworthy of belief.

Union, contacting between 50 and 100 employees. He became a member of the in-plant union organizing committee.[3]

About a week before the election, Baxley disseminated information that his dog had been shot[4] and that a note was affixed to his door reading "Stay the hell away from the Union hall." He delivered the note to the Union.[5]

Baxley discussed the contents of the note and the dog incident with fellow employees. He testified that he "tried to make it look like that the company could gain by doing this."[6] The employees to whom Baxley related the dog and note incidents were located in his immediate work area.[7] David Brown was one of them.

On the day before the election, April 18, 1973, at about 12:30 a.m.,[8] as Respondent's then department superintend-

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[3] On April 5, by telegram, and on April 6, by letter, the Respondent was advised that Baxley was a member of the Union and serving as a member of the Union In-Plant Voluntary Organizing Committee.

[4] One witness described the dog: "It looked like a mixed breed, mostly collie . . . light tan, with a black nose."

[5] The note which was received in evidence contained printed words as follows:

STAY THE HELL
AWAY FROM UNION HALL
CURIOUS

[6] Baxley also testified, "I told them that I found the note on my door and I just left [it] up to their imaginations from there."

[7] Baxley testified that he had also lied to his wife about the incidents.

[8] The findings of fact in this paragraph are drawn from the testimony of Wayne Farrell Lindley, now manufacturing manager of the knitting division, which is credited.

ent of fiber finishing, Wayne Farrell Lindley, was walking through the production area, Baxley stopped him and asked if he could talk to him for a moment. Baxley said that "he had some questions that he would like to ask [Lindley] concerning the union and the election." Several employees were present while Lindley responded to Baxley's questions. Later during the shift, Shift Supervisor Ronald Brock informed Lindley that Baxley desired to speak with him again. Brock and Baxley met with Lindley at which time Baxley informed Lindley that "he had changed his mind about supporting the union; that he would like to tell the people that he had talked with that he had changed his mind and he didn't know how to get in touch." Baxley asked for permission to use the bulletin board for such purpose. Lindley responded that he "felt sure that he could not do that." The possibility of using the radio station was then discussed. A list of employees (about 100) who had signed union cards was turned over to Lindley by Baxley. Near the end of the conversation, Baxley mentioned that "somebody had put a note on his door and that his dog had been killed." Baxley said that "this was one of the reasons[9] he wanted out of the whole thing—the support of the union." He left Lindley with the "impression" that "he

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[9] Union Representative Riffe testified that Baxley indicated to him on April 19 that he had changed his mind about the Union "because of the threats that he got from the foreman and the supervisors and the company about his union activities." In this respect, "the note and the dog incident" were mentioned. Shortly after the election, Baxley gave the Union a handwritten statement stating that the reason for informing Lindley of his change of heart was because of the shooting of his dog and the threatening note on his door.

thought the company had done it or that somebody connected with the company had done it." [10]

Lindley informed his boss, Holden, of Baxley's conversation. Holden told Lindley to call Douglas Harold Matthews,[11] the personnel director. Lindley discussed the matter with Matthews.

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[10] Baxley's version of the foregoing facts differed substantially from the testimony related by Lindley. Baxley first testified that he informed Lindley one morning that he was abandoning his support of the Union, but he did not recall what he said on the subject of changing his mind. Continuing his testimony, he described the incident in more detail. Baxley said that Lindley "was going around to different places that morning and talking to different people" and approached a group of six or seven employees including Baxley. "Pros and cons" about the Union were discussed. Baxley asked Lindley questions in respect to wages and fringe benefits. These questions were prounion orientated and were somewhat critical of the Company. After the discussion ended, Baxley followed Lindley "off on the side" and told him he was "dropping [his] support of the union." Baxley could not remember Lindley's response. "Very soon" thereafter, Brock informed Baxley that Lindley wanted to see him in his office. Both Brock and Baxley appeared in Lindley's office where Baxley informed Lindley that he had changed his mind and was sorry for what he had done. He turned over to Lindley a list of union card signers "to show that [he] had changed [his] mind."

Baxley's testimony on cross-examination in respect to the above events was punctuated with many failures to recall. At one point, he said that he was "starting to remember." Nevertheless, the content of his answers, his evasive responses, and his demeanor gave the impression that he was not revealing the whole truth; in fact, it is concluded that he lied specifically in regard to his claims that Lindley talked to the employees as described; that he took Lindley aside and told him he changed his mind about the Union; and that Lindley called him into his office. Although Lindley heard Baxley's testimony, he denied these assertions of Baxley. Lindley is credited; demeanor has been considered. Moreover, it is highly unlikely that a company supervisor would lie to the disadvantage of the Company when to have corroborated Baxley would have enhanced Baxley's credibility.

[11] In the record, Matthews is referred to as "Matthess."

According to Baxley, he left work at 8 o'clock on the morning of April 18, 1973. Upon arriving home, he received a phone call from Matthews' secretary bidding him to return to the plant. Baxley went to Matthews' office where Matthews asked him, "Can I help you?" Baxley explained that he had changed his mind and asked Matthews for "suggestions in a way that it could be straightened out that close to the election." Matthews suggested the radio station,[12] Hemmingway, WKYB. Baxley then went to the radio station with the idea of making a public service announcement of his defection. He was advised that such an announcement was illegal and that his announcement would require payment. Baxley discussed this matter with Lindley. Lindley said, "I wouldn't be surprised if someone were to come up—to come out to your house with the money." Thereafter, employee David Brown collected $114.75 which was given to Baxley.

On April 19, 1973, in the morning, Union Representative Phillip Pope appeared at Baxley's home. Apparently Pope had heard of Baxley's apostasy, but he was unable to reconvert him. Some time later, during the same morning, employee Brown and Baxley arrived at the radio station where they met Union Representatives Pope and Riffe. In a private talk with Riffe, Baxley was again converted to the Union's cause.[13]

Baxley left the radio station in the company of the union representatives who, together with Baxley, composed and

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[12] Baxley testified that this was the first time that the radio station had been mentioned, and that it had not been mentioned in Lindley's office. Lindley's testimony was otherwise.

[13] Baxley explained, "He asked me how long did I think I would last within the plant on the job if I were to air that message. How

sent a telegram to the Respondent and distributed a leaflet with the same verbiage at the plant gates prior to the commencement of the election.[14] A copy of the leaflet follows:

> Mr. Jack Wellman, President
> Wellman Industries, Inc.
> Johnsonville, South Carolina 29555
>
> This telegram will officially advise you and all of my fellow workers regardless of the rumors they may have heard that as of today, April 19, 1972 at Noon that my position remains the same in support of the Union, as contained in the previous telegram which I recently sent you.
>
> I am now continuing to support the Textile Workers Union of America, AFL-CIO 100% and I intend to urge each and every friend of mine at Wellman Industries to vote yes for the Union today and tomorrow.
>
> This will also officially advise you that I wish to be excused from my job on April 20th through April 21th in order that I may serve as an official observer for the Union.
>
> During the past few weeks numerous threats and pressure have been brought against me because of me supporting the Union.

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secure my job would be and he put it like that I couldn't help but agree with him . . . ." Baxley testified that the Union did not promise him a job "at that time." Elaborating, Baxley said that Pope sometime previously had "[j]ust mentioned the salary that union people make and how I might stand a good chance of getting a position with them. How much—that I might stand a good chance of being president and unionizing the plant."

[14] The same verbiage was substituted to the employees through an automatic telephonic device whereby an employee could dial a union number and receive the message.

> Several acts of volience [sic] have taken place at my home in Johnsonville, where my collie dog was shot within the past ten days. In addition, several threats have been made against me and my wife in writing and left attached to the door of my home, during the period when my wife and I both were absent visiting her seriously ill Brother who has been hospitalized in Florence, South Carolina.
>
> Mr. Wellman, I call upon you in the name of human decency and justice to see to it that my rights are protected to support the Union as provided by Federal Law.
>
> I am sending a copy of this telegram to The National Labor Relations Board for my legal protection and to prove Company knowledge of my support for the Union.
>
> I am having reproduced a memograph [sic] copy of the above information for all of my fellow workers to see and I am incouraging [sic] every worker at Wellman to *Vote Yes.*
>
> Sincerely yours,
>
> KENNETH BAXLEY
>
> Copy To:
>
> All Employees of Wellman Industries

Riffe suggested the telegram as "legal protection" against possible company reprisals upon learning of Baxley's reconversion.[15]

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[15] In this respect, Riffe testified credibly:

> As I said, Mr. Pope, Mr. Baxley and myself, prepared the telegram. To the best of my recollection, Mr. Pope did the

According to Baxley, on September 29, 1972, he experienced a religious conversion. At the same time, he recanted his reconversion to the union cause of April 19, 1972. Said he, "When I was converted into a Christian—when I got changed, the Bible teaches against . . . unions as best as I could interpret it, to me. I felt it was wrong that I should go letting what I had done in the past stand when I could so very easy straighten it out and save a lot of hard feelings and maybe keep someone from getting hurt because of what I did." [16]

Approximately 5 months later, around the first part of March 1973, Baxley decided to quit his job because of

actual writing of the telegram. During the course of drafting the telegram and discussing the language that was to go into the telegram, Mr. Baxley said he was concerned with what people was going to say or think about him changing his position and the reasons for it and how it would make him look in other people's eyes. In other words, in his fellow workers eyes in the plant.

He said he felt that if he made some reference to what happened about this note being on the door and about the dog people would have, I guess a counter-attitude or would look on him at least with more understanding attitude about what he had almost renounced the union because of the pressure and strain he was under because of those incidents.

During the same conversation we talking in terms of also reproducing the telegram in his statement in support of the union, and he [sic] terms of a leaflet to give out. The whole discussion took place about the same time.

[16] Baxley further testified:

I felt condemned about it. Last September we had a revival at our church. I was saved. I was converted to a Christian. They condemned me and I had to come out with it. The purpose of the whole thing to begin with, to sum it all up, was my own personal greed, what I could gain in this world, who I could run over and get to [the] top any way I could, no matter what it took. That is what it was all about—to get what another man has got.

Sunday assignments. On the day of his quitting, he told Matthews about "the situation." The following week Baxley returned for his check, at which time Matthews asked him if he "wanted to talk about it then because [he] was no longer an employee of the company." Baxley voluntarily agreed to "make a document."

Prior to his resignation, Baxley had discussed the subject of the Union with his minister, but had not discussed the alleged falsity of the dog-shooting incident and the note story with him. Matthews was the first person connected with the Respondent to whom Baxley revealed the alleged falsity.[17]

The alleged falsity concerned the subject matter of the telegram, the leaflet, and the telephonic communication. Baxley claimed that no threats had been made against him for supporting the Union, that the dog, although dead, had not been shot, and the note appended to the door had been composed and hung there by himself.

B. *Conclusions and Reasons Therefor*

In the Respondent's Motion to Deny General Counsel's Motion for Summary Judgment, the Respondent requested that "the Board should overturn the second election held on April 19 and 20, 1972, and revoke the Certification of Representative in Case No. 11—RC—3365, or in the alternative order a hearing on Respondent's objections to the second election, or in the alternative deny the General Counsel's Motion for Summary Judgment and order a hearing in Case No. 11—CA—5091 in which Respondent would be

[17] Baxley testified that he had mentioned the alleged falsity to John S. Evans, a Wellman employee and a member of his church.

permitted to present evidence that the Textile Workers Union of America, AFL-CIO, CLC, was not properly certified as the bargaining representative for Respondent's employees."

When the Board denied the General Counsel's Motion for Summary Judgment, it ordered that an Administrative Law Judge take evidence "limited to the allegation of newly discovered evidence relating to information contained in the Baxley affidavits" which the Board concluded is "now in dispute which can be best resolved by a hearing." It is this dispute which the Administrative Law Judge is directed to resolve which means that a finding must be made after a full hearing as to the validity of the allegations in the Baxley affidavits. Pertinent evidence offered in such hearing is set out above. The question first to be resolved is whether the evidence adduced, measured by credibility considerations, is as presently claimed by the Respondent, that is, in the light of the record as a whole does Baxley's testimony establish that the telegram, leaflet, and telephonic message of April 19, 1972, contain the misrepresentations alleged in his affidavits.[18] In this respect, it is concluded that Baxley was an unreliable witness and that his testimony above-reviewed does not support a finding that the telegram, leaflet, and telephonic message contained the misrepresentations claimed by the Respondent. The following factors have been taken into consideration in reaching this conclusion.

First: It has been found that Baxley lied about certain critical events which occurred at the time he disclosed his union defection to Lindley on April 18, 1972. Having lied

[18] The General Counsel claims that the testimony of Baxley is "inherently incredible."

under oath about events which normally would be fixed in one's mind, his remaining uncorroborated testimony is highly suspect. *Second:* If the information contained in the telegram were false, there appears no logical reason for Baxley's relying on the threats therein suggested as a basis for justifying his defection to Lindley. To defect as he did, at the time that he did, supports the inference that he was motivated by genuine fear. *Third:* While Baxley claimed a conversion in September 1972, and a realization that he was condemned by his prior alleged misconduct, he took no steps to reveal the lying nature of his misconduct or to rectify its impact until March 1973. Moreover, while he discussed the Biblical reprobation as it related to unions with his minister, he refrained from revealing the alleged lies which he now claims brought harm to his fellow employees. If his conversion were genuine and the dog-shooting and note incidents were untrue, it would seem to follow that these alleged falsities would have been the first order of business. His alleged concealment of this sin ("Thou shalt not bear false witness against thy neighbor." Exodus 20:16.)[19] after an alleged genuine conversion indicates that there was no concealment at all but that his present peccavi is fabricated.[20] Rather it would appear that his

[19] "Ye . . . shall neither deal falsely, neither lie one to another." Leviticus 19:11.

[20] Phillip Pope credibly testified that it was not uncommon for a dog to be shot in the neighborhood in which Baxley lived:

> Your Honor, really I live down there, too. Really, it is not all that uncommon. I am not trying to refer to what the other witness has said, but if you were there and you lived in that neighborhood, you would see dogs being shot. Honestly, you would. For example, a dog out on the road got mange or a dog comes and turns over your trash can, I have known people to [have] shot dogs for that.

antipathy toward the Union now has outweighed the purgatorial effect of his conversion and that he has now chosen to lie in order to gratify that antipathy. *Fourth:* Baxley now declares that he lied to his wife. These lies must have caused his wife apprehension and distress. Thus, it seems implausible (had not the dog-shooting and note incidents been true) that Baxley, even though lacking a conversion, would have been so inhumane and callous as to have subjected his wife needlessly to such grief through his lies. *Fifth:* Baxley's history as a Whiffler does not contribute to his credibility. *Finally:* Baxley's demeanor, his failure to recall important matters, his supererogatory remarks, and evasiveness are convincing proof that his testimony, as it relates to his recantation, was untruthful.[21]

Accordingly, based upon the evidence received and an examination of the record as a whole, it is recommended that the Respondent's defense planted on the testimony of Baxley be denied.

II. Cases 11—CA—5101 and 11—CA—5233

In Cases 11—CA—5101 and 11—CA—5233, the General Counsel offered evidence that the Respondent unilaterally and without prior notification to, or consultation with, the Union granted a wage increase to unit employees on October 2, 1972, laid off unit employees on August 27, 1972,

[21] In this connection, I have not been helped by any proof (such as a handwriting expert), except Baxley's testimony as it relates to the record as a whole, as to whether he actually printed the note affixed to his door. I have, nevertheless, compared the printed note with Baxley's handwriting appearing in General Counsel's rejected Exh. 4 and I am unable to determine that both were executed by the same person.

and promulgated new absence and tardiness rules and regulations on January 29, 1973. Personnel Director Matthews admitted that attendance rules were changed to reflect the points attached to the number of absences, instances of tardiness, excused absences, and unexcused absences. Matthews also admitted the changes in work schedules and the laying off of employees on August 25, 1972. These changes were unilateral without notification to or consultation with the Union.

Accordingly, it is recommended that, if an order to bargain is entered in Case 11—CA—5091, an order also be entered in these cases, with an appropriate notice, ordering the employer to cease and desist from making unilateral changes in wages, hours, and working conditions of its unit employees without prior notification to and consultation with the Union.

Dated, Washington, D.C. Oct 15 1973

/s/ Lowell Goerlich

Lowell Goerlich
Administrative Law Judge

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 74-1732

WELLMAN INDUSTRIES, INC.,

Petitioner,

—versus—

THE NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR REVIEW OF THE ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Argued March 7, 1975 Decided April 1, 1975

Before WINTER, CRAVEN and RUSSELL, Circuit Judges.

Robert M. Ziskin (Robert M. Saltzstein, Mirkin, Barre, Saltzstein and Gordon, P.C., Peter D. Hyman, Reginald C. Brown, Jr., Hyman, Morgan and Brown on brief) for Petitioner; Bert Bisgyer, Attorney, National Labor Relations Board, (Peter G. Nash, General Counsel, John S. Irving, Deputy General Counsel, Patrick Hardin, Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, William H. DuRoss, III, Attorney, National Labor Relations Board, on brief) for Respondent.

PER CURIAM:

Upon review of the record and consideration of the briefs and oral argument, we find substantial evidence supporting the board's determination that Wellman Industries, Inc. violated §§ 8(a) (5) and 8 (a) (1) of the Act by refusing to bargain with the union which had been properly certified as the exclusive bargaining representative of the unit employees, and also by unilaterally effecting layoffs of unit employees, granting union employees a wage increase and promulgating new absence and tardiness rules and regulations. We also conclude that the board properly set aside the results of the first election and overruled the company's objections to the second election without a hearing because there were not substantial and material factual issues with respect to either.

Accordingly, enforcement is granted.

APPENDIX C

BEFORE THE NATIONAL LABOR RELATIONS BOARD

WELLMAN INDUSTRIES, INC.

Employer 1/

and

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO-CLC

Petitioner

Case No. 11-RC-3365

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.

Upon the entire record in this case, the Regional Director finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organization(s) involved claim(s) to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c) (1) and Section 2(6) and (7) of the Act.

4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:[2]

All production and maintenance employees including laboratory technicians, plant clerical employees, scheduler and followup man, process control technicians, maintenance technician and quality control technicians employed at the Employer's Johnsonville, South Carolina, plant, excluding office clerical employees, professional employees, sales personnel, seasonal employees, messenger and mail clerk, fabric designer, watchmen, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot will be conducted by the undersigned Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to eh Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not working during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been

discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[3] Those eligible shall vote whether (or note) they desire to be represented for collective-bargaining purposes by Textile Workers Union of America, AFL-CIO-CLC.

Dated October 27, 1971 / s / REED JOHNSTON

at Winston-Salem, N.C. Regional Director, Region 11

[1]The name of the Employer appears as amended at the hearing.

[2]The Employer is engaged in the manufacture of wool and synthetic fiber products on a shift operation at Johnsonville, South Carolina. There are approximately 1000 employees in the unit. The parties are in substantial agreement as to the scope and composition of the unit. The Employer filed a brief which has been carefully considered. The Petitioner by post-hearing communication has agreed with the Employer that the following categories and individuals should be included in the unit: Scheduler and followup man, Frederick Campbell, Jr.; plant clericals Gail Taylor, Helen Powell, Elaine Gulledge, Cecelia Carnell, Sandra Altman, Veretha Cribb, Dell Hardee, Dianne Powell, Irene Ard, Teresa Powell; process control technicians Norma Coker, Jerry Cox, Marsh Perry, Liston Williams, Jr.; maintenance technician William Bullock; and quality control technicians Johnny Dukes, Ladson Hucks. The parties disagree on the following categories or have taken no position:

Seasonal Employees. Each summer starting about the last of May and continuing to the first of September, the Employer hires seasonal help to work mostly in its wool department. During the past summer (1971) some 49 seasonal employees were hired, of which about 30 worked in the wool department. They are hired with the understanding that, and are told that, their jobs will last just for the summer. Most of the employees are high school or college students but sometimes persons who are not students are hired for these seasonal jobs. The seasonal employees perform jobs identical with those performed by regular employees. They receive the same pay and work the same hours and shifts as the regular employees. They are under the same supervision as the regular employees. Although they are told that they will have preference for a job if one is open next summer, they accrue no seniority or right to such jobs. Occasionally, some seasonal employees have become permanent employees but no figures or facts were given on this. Most seasonal employees are children or relatives of both supervisory and hourly-paid regular employees. Of 49 seasonal employees working in the summer of 1971, 14 of them worked in the summer of 1970, 8 in the summer of 1969, and 3 in the summer of 1968. There is no evidence as to whether or not the seasonal employees receive any of the fringer benefits available to regular employees.

Under the facts of this case, I find that the seasonal employees herein should not be in the unit and I so find. The evidence is clear that those employees, most college and high school students, are hired for the summer vacation period only and are terminated at the end of the vacation period. Although there was testimony that some seasonals had become fulltime employees later, there is no evidence as to how many and under what circumstances this occured. It is apparent upon this record that the seasonal employees have little continuing interest in the working conditions of the Employer. They have no guarantee of continued employment in future years, accumulate no seniority, and are mostly students who do not continue any employment with the Employer at the conclusion of the summer season. The Board generally excludes summer employees from the appropriate unit, unless after returning to school they continue to work for the Employer in a regular parttime status. *Crest Wine and Spirits, LTO*, 168 NLRB 754.

Plant Nurse (Hughes). The plant nurse treats normal on-the-job injuries in a facility located between the two main plants. She is a registered nurse and is under the supervision of the personnel manager. The Employer takes no position on this category while the Petitioner would exclude her. I find that the plant nurse is a professional employee and shall exclude her from the unit on that basis.

Messenger and Mail Clerk (Melvin). Under the direct supervision of the administrative vice-president in the main office, the messenger and mail clerk picks up mail at the post office and delivers it to the various departments. He performs odd jobs and errands as directed. He posts notices on the bulletin boards. On rare occasions, he chauffeurs for the father of a management official. The Petitioner would exclude the messenger and mail clerk from the unit while the Employer would include him. In view of the messenger and mail clerk's supervision by a non-production supervisor, his type of work, and limited contact with production employees, I find that he does not have sufficient community of interest with unit employees as to require his inclusion in the bargaining unit. He is therefore excluded from the unit.

Fabric Designer (Dickerson). This salaried employee who receives no overtime converts a drawing to the mechanical aspects of a fabric by putting numbers on a fabric design. He is under the direct supervision of the division manager of the knitting division. He has an office in the main or general office area, which is also adjacent to the production area, where he spends an estimated 20 percent of his time. He frequently works at a knitting machine in the production area. An estimated 80 percent of his time is spent in production areas. Dickerson is told about a design, "This is generally what we want it to look like". Then in consultation with the division manager of knitting, they decide on the type pattern, type machine and the dye needed. Dickerson then arranges the needles and jacks in the knitting machine so as to reproduce the wanted geometric pattern on the fabric. Although 90 percent of his job will be concerned with specific patterns allowing little room for discretion, at times he must exercise independent judgment as to whether or not to go with one type of yarn or stitch. The fabric designer receives a salary higher than that of shift supervisors. He works by himself and supervises noone. He had 20 years of employment as a fixer prior to assuming his present job. The Employer estimates that an employee would need at least two to three years experience as a fixer before he could perform the duties of a fabric designer. Upon the record, I find the fabric designer, because of his distinctive training and experience and functions, to be a technical employee. *Litton Industries of Maryland*, 125 NLRB 722. I further find that his skills and duties are of such a nature that he lacks a community of interest with the unit employees and I shall exclude him from the unit. *Sheffield Corporation*, 134 NLRB 1101.

Clerical Employees. Three clerical employees (Joye, Hanna and Bazen) are either in dispute or no position was taken on them. One, Joye, is classified by the Employer as a shipping clerk. She works in the general or main office area in a separate office. Her duties include gathering up production records and reporting these back to the shipping department for shipment of goods to companies for which the Employer is doing commission knitting. She also transmits records on a telecopier to Boston. It is estimated that she spends probably ten percent of her time in the production area. She works under the supervision of the division manager of the knitting division. Hanna is secretary to the production control manager. She works in a reception area just outside the main office area. There is no evidence that she goes into the factory area. Bazen works in the main fiber office.

She types master for a duplicating machine which produces forms for use throughout the Employer's operations, including office forms. 35 to 40 percent of her time is directed toward use of this labeling machine which is located in the production area. The record is not clear as to how much of her time is actually spent at this machine and how much in typing the masters for use on the machine. Upon the entire record and in view of their primary work location in the main office, I find that these three employees are office clericals and I shall exclude them from the unit.

[3]In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236; *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759, decided April 23, 1969. Accordingly, it is hereby directed that an election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. The REgional Director shall make the list available to all parties to the election. In order to be timely filed, such a list must be received in the Regional Office of the National Labor Relations Board, Region II, 1624 Wachovia Building, Winston-Salem, North Carolina 27101, on or before November 3, 1971. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

APPENDIX D

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 11

WELLMAN INDUSTRIES, INC.

Employer

and

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO

Petitioner

Case No. 11-RC-3365

SUPPLEMENTAL DECISION, ORDER AND DIRECTION OF SECOND ELECTION

Pursuant to a Decision and Direction of Election[1] issued by the Regional Director of the Eleventh Region on October 27,[2] a secret ballot election was conducted under the supervision of the aforementioned Regional Director on November 17 and 18, with the following results:

[1]The unit found to be appropriate is: "All production and maintenance employees including laboratory technicians, plant clerical employees, scheduler and followup man, process control technicians, maintenance technician and quality control technicians employed at the Employer's Johnsonville, South Carolina, plant, excluding office clerical employees, professional employees, sales personnel, seasonal employees, messenger and mail clerk, fabric designer, watchmen, guards and supervisors as defined in the Act."

[2]All dates are 1971 unless otherwise stated.

Approximate number of eligible voters	1074
Void ballots	5
Votes cast for Petitioner	488
Votes cast against participating labor organization	499
Valid votes counted	987
Challenged ballots	18
Valid votes counted plus challenged ballots	1005

The challenged ballots are sufficient in number to affect the results of the election.

Copies of the Tally of Ballots were duly served on the authorized representatives of the parties.

On November 26, the Petitioner filed timely objections to conduct affecting the results of the election. A copy of the objections was duly served on the Employer.

The text of the Petitioner's objections is as follows:

"(1) The Company showed the film entitled 'And Women Must Weep' to all employees during their Captive Audience Meetings just prior to the election. The last group to attend the Captive Audience Meeting was on November 16, the day before the election began.

"(2) The Company's Supervisors were standing at the Time Clock when the employees were reporting for work on the afternoon shift beginning at 4:00 P.M., on the day the election began. (November 17, 1971). The employer through its agents, made misrepresentation which involved a substantial departure from the truth at a time when the Petitioner had no opportunity at all to make a reply.

"(3) The Employer, through its agents, engaged in campaign trickery just prior to the election, when the Petitioner had no opportunity to reply.

"(4) Supervisors intimidated employees by questioning employees as to:

(a) How they intended to Vote.
(b) How they felt about the Union.

"By the above and other actions the Company, interfered with, restrained, and coerced the employees so as to deny them an opportunity to make a free and untrammeled choice in the election."

Pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, an investigation of said objections and challenged ballots has been conducted. All parties have been afforded full opportunity to submit and present evidence bearing on the issues and the undersigned, after carefully considering the evidence disclosed by the investigation, reports as follows:

THE CHALLENGES:

The Board Agent challenged the ballots of *Isaac Cobb, Ivory Cooper, A. I. Stone, Donald Creel, Lamar Henry* and *Janice Tanner,* because their names did not appear on the eligibility list.

An examination of the Employer's records discloses that Cobb quit on September 5, 1970, and has not worked for the Employer since, an; that Cooper and Stone were hired on October 25, Creel on November 1, and Henry on November 11. As Cobb was not an employee on the payroll eligibility date[3] and the day of the election, and as Cooper, Stone, Creel and Henry were not employees on the payroll eligibility date the undersigned sustains the challenges to their ballots.

[3]October 24.

The Petitioner challenged the ballots of *Kathleen Hanna, Edward Pasley* and *Samuel Green* on the ground that they were employed at the Wellman Country Club as cooks and waiters and were not production and maintenance employees.

Employer records disclose that Hanna and Green did in fact work at the Wellman Country Club as cooks and waiters at the time of the election, do not clock in, and have no duties at the plant. The undersigned accordingly finds that Hanna and Green are not eligible votes and the challenges to their ballots are sustained.

Since the remaining challenges are not determinative, it is unnecessary to resolve them.

OBJECTION 2:

This objection complains of a handbill distributed by supervisors of the Employer.[4] Two questions are presented, the times of the distribution and the content of the handbill.

With respect to the time: Petitioner's witnesses state that the distribution was made before the polls opened on November 17, and simultaneously with the distribution of pay checks on November 18 before the polls opened for the second session. William L. Mace, Industrial Relations Director, states that the distribution was made by Employer's supervisors on November 15 and 16, but also states that a phone call to verify the accuracy of the information in the handbill was made on November 16, 1971 *"before the leaflet was distributed."* [Emphasis supplied.] In the undersigned's view it is unnecessary to precisely determine when the handbill was distributed because of the nature of the material contained therein, even the earliest date suggested, November 15, would have precluded an effective opportunity to reply.

[4]Attached as Appendix A.

The handbill entitled *"Was the Union Afraid to Show This Contract"* purports to quote rates of pay for certain specific job classifications in effect for employees represented by the Petitioner at Textile Paper Products, Inc., Hendersonville, North Carolina. The handbill also asks the employees to "Note that there are three increases during the five-year contract of six cents each and that there are no wage increases in the years 1970 and 1972."

Investigation indicates that the Petitioner is the certified bargaining agent for employees of Textile Paper Products, Inc., a subsidiary of Alton Box Board Company, Paper Tube Division, and the contract[5] from which Employer took minimum prevailing rates for use in its handbill was cancelled and superseded October 5, 1970, by a new contract[6] currently in effect giving increases in all job classifications mentioned by Employer in its handbill.

Furthermore, the statement by Employer in its handbill that there are no wage increases in the years 1970 and 1972 was not factual since the contract from which the Employer took the information was cancelled and superseded October 5, 1970, and the existing contract states in Schedule A, page 30, "on October 4, 1971 and October 2, 1972, the rate range will increase .13."

The undersigned finds that the handbill clearly contains misstatements of fact regarding minimum pay rates in effect at the time of the election, and also misstatements regarding the wage increase for 1972.

Voters were not in a position to know the truth of the facts asserted.

[5]Attached as Appendix B.

[6]Attached as Appendix C.

The undersigned is of the opinion that the misrepresentations were matters of vital concern to the voters, that the voters were not in a position to know the true facts, and could reasonably be expected to have a substantial effect upon their choice of a bargaining representative.

There are present here all of the factors specified by the Board, the presence of which requires that the election be set aside to insure employees that freedom of choice guaranteed them by the Act.[7]

The Board in this case said "We believe that an election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election."

The undersigned finds that the handbill was distributed at a time which precluded an effective response by the Petitioner, and for the reasons set forth above, finds that the misrepresentations were material and substantial and reasonably tended to interfere with the employees' free choice in the election and raise material and substantial issues warranting setting aside the election.

Having found that Objection 2 raises substantial and material issues warranting setting aside the election, the undersigned deems it unnecessary to consider Objections, 1, 3 and 4.

CONCLUSIONS AND ORDER

(a) The challenges to the ballots of *Isaac Cobb, Ivory Cooper, A. I. Stone, Donald Creel, Lamar Henry, Kathleen Hanna* and *Samuel Green* are sustained.

[7] *Hollywood Ceramics, Inc.*, 140 NLRB 224; *ORE-IDA Foods, Inc.*, 160 NLRB 1396.

(b) The remaining challenges are not determinative, therefore it is unnecessary to resolve the.

(c) Having found that Objection 2 raises substantial and material issues warranting setting aside the election, the undersigned deems in unnecessary to consider Objections 1, 3 and 4.

IT IS HEREBY ORDERED that the election conducted on November 17 and 18 be, and it hereby is, set aside.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be conducted among the employees in the unit found appropriate, at a time to be determined by the undersigned. Eligible to vote are those in the appropriate unit who are employed during the payroll period immediately preceding the issuance of the Notice of Second Election,[8] including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the elction date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been dis-

[8] In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236; *N.L.R.B.* v. *Wyman-Gordon Company*, 394 U.S. 759, decided April 23, 1969. Accordingly, it is hereby directed that an election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 11 within seven (7) days after the date of issuance of the Notice of Second Election by the Regional Director. The Regional Director shall make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

charged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date. Those eligible shall vote whether they desire to be represented for collective bargaining purposes by the Textile Workers Union of America, AFL-CIO-CLC.

Dated at Winston-Salem, North Carolina this 10th day of February 1972.

Reed Johnston, Regional Director
National Labor Relations Board
Region 11
1624 Wachovia Building
Winston-Salem, North Carolina 27101

WAS THE UNION AFRAID TO SHOW THIS CONTRACT?

THE UNION'S "PROOF OF PUDDING" PROPAGANDA IS ANOTHER EXAMPLE OF TWUA HALF-TRUTHS. THEY WANT YOU TO BELIEVE THAT THE FRONT ROYAL, VIRGINIA EMPLOYEES' RATES OF PAY ARE OVER $4.00 AN HOUR. THE TRUTH IS THAT THESE EMPLOYEES WORK AT PIECE RATES. THEIR HOURLY RATE IS MUCH LOWER, AND NO DOUBT THEY ARE THE HIGHEST PRODUCERS IN THE PLANT.

THE TWUA PROMISED ITS WAY INTO TEXTILE PAPER PRODUCTS, INC. WITH THE SAME PROMISES THEY HAVE BEEN MAKING YOU. DID THEY KEEP THEIR PROMISES? HERE ARE EXCERPTS FROM THE TEXTILE PAPER PRODUCTS, INC. CONTRACT.

"AGREEMENT BY AND BETWEEN TEXTILE PRODUCTS, INC., HENDERSONVILLE, NORTH CAROLINA PLANT AND TEXTILE WORKERS UNION OF AMERICA, AFL-C10-CLC, JUNE 3, 1968 TO JUNE 3, 1973."

"Article 8:00 – *Vacations*
8.03 – Paid vacations shall be granted on the following basis:

One (1) work week after one (1) year of continuous employment.
Two (2) work weeks vacation after three (3) years continuous employment."

"Schedule A – *Wage Schedule*
The present job classification or job titles are as listed below.

JOB CLASSIFICATION	MINIMUM PREVAILING RATE	JOB CLASSIFICATION	MINIMUM PREVAILING RATE
Winder Operator	$1.80	Towmotor Operator	$1.60
Roll Hanger	1.60	Baler Operator	1.60
Saw Man	1.60	Recutter Operator	1.70
Slitter Operator	1.80	Maintenance Man	2.25
Slitter Helper	1.60	General Labor	1.60

Effective on the third day of June, 1968 each and every employee is to receive an across the board increase of $0.06 per hour.

Effective on the first day of December, 1969 each and every employee is to receive an across the board increase of $0.06 per hour.

Effective on the thirty-first day of May, 1971 each and every employee is to receive an across the board increase of $0.06 per hour.

NOTE THAT THERE ARE THREE WAGE INCREASES DURING THE FIVE-YEAR CONTRACT OF SIX CENTS EACH AND THAT THERE ARE NO WAGE INCREASES IN THE YEARS 1970 AND 1972.

WHY DIDN'T THE TWUA GET THE FOUR (4) WEEKS VACATION FOR THIS HENDERSONVILLE, N.C. PLANT THAT THEY HAVE BEEN PROMISING THEY WILL GET FOR WELLMAN EMPLOYEES?

DO THE EMPLOYEES AT HENDERSONVILLE, N.C. LIKE EATING THE PUDDING THAT THE TWUA PREPARED FOR THEM? COMPARE YOUR VACATION PLAN AND PAY RATES WITH THEIRS. DID THE TWUA KEEP ITS PROMISES? CAN YOU TRUST THEM? WE SAY "NO".

VOTE NO

AGREEMENT

On this *third* day of June, 1968, TEXTILE PAPER PRODUCTS, INC. (hereinafter referred to as the "Company" and/or the "Employer") and TEXTILE WORKERS UNION OF AMERICA, AFL-CIO, CLC (hereinafter referred to as the "Union") have agreed upon the following joint statement of hours, wages and other working conditions applicable to the Company's operations in its present facility and plant location at Hendersonville; North Carolina.

ARTICLE 1.00

RECOGNITION

1.01 As a result of and pursuant to an election conducted by the National Labor Relations Board on January 19, 1968, the Company recognizes the Union as the sole and exclusive bargaining agent for: all production and maintenance employees at the Employer's Hendersonville, North Carolina Plant including the over-the-road truckdrivers and janitor, but excluding the product development engineer, guards, and supervisors as defined in the Act and as such unit is limited and defined by the Certification of the National Labor Relations Board in Case No. 11-RC-2642, dated January 29, 1968.

1.02 It is agreed and understood that the above recognition acknowledges and satisfies the representation rights of the Union as the sole and exclusive bargaining agent for the above-defined employees. The recognition herein granted conveys no rights, expressed or implied, to the Union or any employees, other than the right of such of the Company's employees as may be from time to time within the above-defined bargaining unit to be represented by the Union, as and to the extent specifically provided by the National Labor Relations Act, as amended; the recognition herein granted to the Union refers only to its right to represent the defined group of the Company's employees who may be engaged in production and maintenance work at the facilities in Hendersonville, North Carolina.

It is further understood that the Company recognizes the Union as the bargaining representative for the above-defined unit of its employees engaged and working in the production and maintenance work at said facilities in Hendersonville, North Carolina, and have been doing production and maintenance work at said facilities, provided such work is available and the Company determines that said employees should perform such work.

1.03 The Union recognizes the responsibilities imposed on it as the exclusive bargaining agent of the production and maintenance employees and realizes that in order for the Company to provide maximum opportunities for continuing employment, good working conditions and pay, the Company must be in a strong competitive position, which means it must produce at the lowest possible cost, consistent with fair labor costs. The Union and its members, therefore, agree that they will cooperate with the Company and support its efforts to assure a full day's work on the part of its members; that they actively will combat absenteeism and any other practice which restricts production. They further agree that they will support the Company in its efforts to eliminate waste in production and throughout the plant, conserve materials and supplies, improve the quality of work, prevent accidents, and strengthen good will between the Company, the employees, the customers and the public.

1.04 This Agreement cancels and supersedes all previous contracts and agreements (written, oral, express or implied) of every nature between the Company and the Union, except those specifically incorporated herein by reference. This Agreement cannot be modified, amended, added to, or subtracted from, except by an instrument in writing signed by the Company and the Union of equal formality with this instrument. No grievance or arqitration determination, or individual or continued departure in practice and administration hereof by the parties shall affect a modification or alteration hereof.

1.05 The Company and the Union agree that this document embodies all agreements that exist between them and that any term, condition or matter affecting Employer-Employee relations not specifically relinquished or released in this contract, is hereby reserved and exclusively vested in the Company. Nothing in this Agreement shall be construed as constituting an acknowledgment by the Company that any work, operation

SCHEDULE A

Wage Schedule

The present job classifications or job titles are as listed below.

JOB CLASSIFICATION:	Minimum Prevailing Rate
Winder Operator	1.80
Roll Hanger	1.60
Saw Man	1.60
Slitter Operator	1.80
Slitter Helper	1.60
Towmotor Operator	1.60
Baler Operator	1.60
Recutter Operator	1.70
Maintenance Man	2.25
General Labor	1.60

Effective on the third day of June, 1968 each and every employee is to receive an across the board increase of $0.06 per hour.

Effective on the first day of December, 1969 each and every employee is to receive an across the board increase of $0.06 per hour.

Effective on the thirty-first day of May, 1971 each and every employee is to receive an across the board increase of $0.06 per hour.

Effective on the signing of the Agreement permanent employees on the payroll June 3, 1968 will receive a twenty-five (25) dollar wage bonus and employees who are on that payroll and constantly remain on the payroll until December 15, 1968 will receive a twenty-five (25) dollar wage bonus.

AGREEMENT

On this fifth day of October, 1970, Alton Box Board Company, Papertube Division, (hereinafter referred to as the "Company" and/or the "Employer") and TEXTILE WORKERS UNION OF AMERICA, AFL-CIO-CLC (Hereinafter referred to as the "Union") have agreed upon the following joint statement of hours, wages and other working conditions applicable to the Company's operations in its present facility and plant location at Hendersonville, North Carolina.

ARTICLE 1.00

RECOGNITION

1.01 As a result of and pursuant to an election conducted by the National Labor Relations Board on January 19, 1968, the Company recognizes the Union as the sole and exclusive bargaining agent for: all production and maintenance employees at the Employer's Hendersonville, North Carolina Plant including

the over-the-road truckdrivers and janitor, but excluding the product development engineer, guards, and supervisors as defined in the Act and as such unit is limited and defined by the Certification of the National Labor Relations Board in Case No. 11-RC-2642, dated January 29, 1968.

1.02 It is agreed and understood that the above recognition acknowledges and satisfies the representation rights of the Union as the sole and exclusive bargaining agent for the above-defined employees. The recognition herein granted conveys no rights, expressed or implied, to the Union or any employees, other than the right of such of the Company's employees as may be from time to time within the above-defined bargaining unit to be represented by the Union, as and to the extent specifically provided by the National Labor Relations Act, as amended; the recognition herein granted to the Union refers only to its right to represent the defined group of the Company employees who may be engaged in production and maintenance work at the facilities in Henderson, North Carolina. It is further understood that the Company recognizes the Union as the bargaining representative for the above-defined unit of its employees engaged and working in the production and maintenance work at said facilities in Hendersonville, North Carolina, and have been doing production and maintenance work at said facilities, provided such work is available and the Company determines that said employees should perform such work.

1.03 The Union recognizes the responsibilities imposed on it as the exclusive bargaining agent of the production and maintenance employees and realizes that in order for the Company to provide maximum opportunities for continuing employment, good working conditions and pay, the Company must be in a strong competitive position, which means it must produce at the lowest possible cost, consistent with fair labor costs. The

Union and its members, therefore, agree that they will cooperate with the Company and support its efforts to assure a full day's work on the part of its members; that they actively will combat absenteeism and any other practice which restricts production. They further agree that they will support the Company in its efforts to eliminate waste in production and throughout the plant, conserve materials and supplies, improve the quality of work, prevent accidents, and strengthen good will between the Company, the employees, the customers and the public.

1.04 This Agreement cancels and supersedes all previous contracts and agreements (written, oral, expressed or implied) of every nature between the Company and the Union, except those specifically incorporated herein by reference. This Agreement cannot be modified, amended, added to, or subtracted from, except by an instrument in writing signed by the Company and the Union of equal formality with this instrument. No grievance or arbitration determination, or

ARTICLE 20.00

DURATION

20.01 This Agreement, shall become effective as of the fifth day of October, 1970, and shall remain in full force and effect until the sixth day of October, 1973, and thereafter the Agreement shall automatically renew for another similar period unless at least sixty (60) days prior to October sixth, 1973, either party to this Agreement gives written notice to the other party of their desire to terminate this Agreement, in which event this Agreement shall terminate on the sixth day of October, 1973, following the giving of such written notice. All rights and benefits of the employees are as a result of this contract and the rights of all employees and the Union cease with the termination of this contract.

20.02 Either party desiring to change (but not terminate) this Agreement shall serve upon the other party written notice of changes desired at least sixty (60) days prior to the renewal date of this Agreement, in which event this Agreement shall be automatically renewed for one year, except as otherwise specifically provided in this Article 20.00 subject, however, to such change as may be mutually agreed upon.

20.03 Pending negotiations of any proposed amendments or changes in the terms of this Agreement or pending negotiations following notice to terminate as set forth above, this Agreement shall continue in effect until a new Agreement is reached, or until either of the parties hereto serve written notice on the other by registered mail, return receipt requested, that negotiations have terminated. After the serving of such written notice, there shall be no strike or lockout during the following period of fourteen (14) work days, in order to give both parties time to reconsider their decision.

SCHEDULE A

The present JOB CLASSIFICATIONS or JOB TITLES are listed below with the existing rate ranges:

	Minimum	Maximum
Maintenance Trainee	2.45	2.70
Maintenance Man	2.85	3.05
Maintenance Machinist	3.20	3.35
Spiral Operator	2.41	2.56
Roll Hanger	2.16	2.26
Saw Man	2.01	2.11
Slitter Operator	2.36	2.46
Slitter Helper	2.06	2.26
Inspector		2.16
Recutter Feeder		2.06
Baler		2.06
Warehouseman		2.36
Lift Truck Operator	2.06	2.21
General Labor	1.81	1.96
Truck Driver (Hourly)	2.25	2.44
over 175 mi. round trip		.092 mile

Spiral operators will receive the maximum of the rate range after 6 months continuous service as an operator.

General labor will receive the maximum of his rate range upon the completion of his probationary period.

Other employees who have a rate range will be entitled to their maximum after 3 months continuous service in their appropriate classifications.

On October 4, 1971 and October 2, 1972 the rate range will increase .13. On these dates the T/D mileage rate will increase to .097 and .103 respectively.

Employees assigned to the second (2nd) shift shall receive five (5) cents per hour above their regular basic hourly rate for all hours worked while on such shift or ten (10) cents for the third (3rd) shift.

APPENDIX E

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 11

WELLMAN INDUSTRIES, INC.

Employer

and Case No. 11-RC-3365

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO-CLC

Petitioner

SECOND SUPPLEMENTAL DECISION
AND
CERTIFICATION OF REPRESENTATIVE

Pursuant to a Supplemental Decision, Order and Direction of Second Election[1] issued by the undersigned Regional Director for the Eleventh Region February 10,[2] a rerun election by secret ballot was held under the supervision of the aforementioned Regional Director on April 19 and 20, with the following results:

[1]The unit found to be appropriate is: "All production and maintenance employees including laboratory technicians, plant clerical employees, scheduler and followup man, process control technicians, maintenance technician and quality control technicians employed at the Employer's Johnsonville, South Carolina, plant, excluding office clerical employees, professional employees, sales personnel, seasonal employees, messenger and mail clerk, fabric designer, watchmen, guards and supervisors as defined in the Act."

[2]All dates are 1972 unless otherwise stated.

Approximate number of eligible voters	1134
Void ballots	33
Votes cast for Petitioner	557
Votes cast against participating labor organization	466
Valid votes counted	1023
Challenged ballots	46
Valid votes counted plus challenged ballots	1069

The challenged ballots were not sufficient in number to be determinative.

Copies of the Tally of Ballots were served on the authorized representatives of the parties.

Timely objections and supplemental objection to conduct affecting the results of the election were filed by the Employer on April 25. A copy of the objections and supplement were duly served on the Petitioner.

The text of the Employer's objections is as follows:

"(1) The Petitioner, through its agents, engaged in campaign trickery through the use of printed material and radio tapes and other means of communication just prior to the election when the Employer had no opportunity to reply.

"(2) The Petitioner, through its agents, and through persons or groups not themselves involved in the current Election exerted repreated pressure on voters during the campaign, more especially during the latter days of the campaign which tended to create for the voters a fear of job loss, violence and other trouble and difficulty.

"(3) The Petitioner, through its agents, engaged in a course of violence on or near company property resulting in severe damage to a number of automobiles and other personal property of the voters tending to create an atmosphere of violence.

"(4) The Petitioner, through its agents, handed out at the gate to the employer's plant and at other strategic locations on April 19, 1972 at 8:00 A.M. on the date of the Election a four page brochure which contained among other language the words 'It was an election lie!' and the words 'Well, we say that statement was a hunk of ELECTION BALONEY.' These statements and other contents of the handout were a blatant lie which was intended to deceive the employees and to which the employer had no effective opportunity to reply.

"By the above and numerous other actions, the Petitioner, its agents and other persons and groups acting under the direction of the Petitioner as agents, interfered with, restrained and coerced the employee voters so as to deny them an opportunity to make a free and untrammeled choice in the elections."[3]

Pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, an investigation of said objections has been conducted. All parties have been afforded full opportunity to submit and present evidence on the issues and the undersigned having carefully considered the evidence disclosed by the investigation, makes the following findings:

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[3]Only incidents which occurred between November 18, 1971, the last day of the first election, and April 20, the last day of the rerun election are considered. See *The Singer Company, Wood Products Division*, 161 NLRS 956.

OBJECTION 1:

A. "Special Union Meeting" leaflet with attachments.[4]

The Employer alleges that Petitioner made substantial and material misrepresentations by its distribution of Appendixes 1, 1a and 1b on April 17 and 18 at a time when it did not have sufficient time in which to reply. The Employer objects on the ground that the material implies that the real estate transaction was paid for with Company funds accumulated by denying the employees back wages for the period of the wage-price freeze. The Employer states that this was a personal transaction of Employer President John C. Wellman, involving only his private resources. Furthermore, the Employer contends that incorrect versions of this handbill were distributed by the Petitioner. Employer's only evidence is a statement from its attorney that he received this handbill with its attachments being identical copies of the deed for $215,000. The Employer argues that this led the employees to believe that the purchase price had been $430,000 rather than $285,000.

B. "Special Message from Harry E. Graham" and enclosures.[5]

The Employer alleges that Petitioner made untrue and deceiving statements in these leaflets mailed to the employees on April 17 to which it did not have an effective opportunity to reply. The Employer argues that the statement "Don't Get 'Messed Up'!" contained in the enclosure is a direct threat of violence by the Petitioner to the employees. Two Employer witnesses stated that they understand this statement to be a threat of violence. Furthermore, the Employer argues that the article entitled "F*L*A*S*H" contains misleading statements by purporting to be a Winston-Salem, N. C., newspaper article and, secondly, by stating, *inter alia*, that "Uncle Sam Accuses Wellman Industries" and "The United States of America,

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[4]Attached hereto as Appendixes 1, 1a and 1b.

[5]Attached hereto as Appendixes 2, 2a and 2b.

through its National Labor Relations Board's Regional Office here, has issued an official Complaint against WELLMAN INDUSTRIES charging that the legal rights of two employees have been violated." The Employer argues that it does not believe that such an article appeared in any newspaper and that it was false since it is the Petitioner who has accused the Employer of certain practices, not the United States Government.[6]

C. Kenneth Baxley Telegram and Related Incidents.

The Employer argues that Kenneth Baxley, an employee acting as an agent of the Petitioner, intentionally deceived and confused the employees by making it known on about April 14, that he had switched his allegiance from Petitioner to Employer and, thereafter, on April 19, reverting to his former support of the Petitioner. It is uncontradicted that on April 19 Baxley sent the Employer a telegram[7] announcing his change of heart, and, on the same day the Petitioner distributed copies of the telegram to the employees at the plant gate.

The Employer further argues that Baxley implies in his telegram that the Employer was responsible for threats made to him and his family and the death of his dog. Additionally, the Employer apparently contends that Petitioner bribed Baxley into switching allegiance since they have submitted statements from three employee witnesses all contending that Baxley informed them he had been offered a substantial position with the Union.

D. "Ring the Bell" leaflet.[8]

It is uncontradicted that Petitioner distributed this handbill on April 20. The Employer cited no specific objection to it, only that it is part of the Petitioner's attempt to mislead the employees.

[6]It is noted that on April 4 the undersigned issued a consolidated complaint in Cases Nos. 11-CA-4811 and 11-CA-4875 alleging, *inter alia*, the items stated in the leaflet.

[7]Attached hereto as Appendix 3.

[8]Attached hereto as Appendix 4.

E. Telephone Message of William Powell.[9]

It is uncontradicted that a telephone message was recorded by employee William Powell and made available for telephone listening on April 18. The Employer objects to the following statement contained in message:

Well, the Union has just discovered that Mr. Wellman bought a farm and a house for $285,000. Now what does that sound like to you. To me it sounds like he took our back wages and bought a farm.

The Employer reiterates that this telephone message implies that Company funds, accrued by denying the employees certain back wages, were used to purchase this real estate, that this is a misstatement since Wellman used his own personal funds for its purchase.

The undersigned has carefully reviewed Appendixes 1 through 5, inclusive, and considered the contentions and arguments presented by the Employer. The undersigned finds that the material is permissible election propaganda which the employees could evaluate for themselves. The mere fact that the messages are inartistically or vaguely worded and might be subject to different interpretations will not suffice to set aside the election.[10] Furthermore, assuming the other incidents related above most favorable to the Employer, the undersigned finds the evidence is insufficient to warrant setting aside the election. Accordingly, Objection 1 is overruled.

[9]Transcript attached hereto as Appendix 5.

[10]*Hollywood Ceramics Co.*, 140 NLRB 221.

OBJECTION 2:

A. Harry E. Graham leaflet.[11]

Although this leaflet was considered in Objection 1, the Employer requested that it also be considered here as relevant to the atmosphere of violence created by the Petitioner which would warrant the setting aside of the election. The Employer offers only the leaflet itself and two witnesses who state that they believed this leaflet to contain a threat by its stating, *inter alia*, "Don't Get 'Messed Up'!"

B. The February 3 Incidents.

An Employer witness, an employee, states that on about the night of February 3, she observed a car following her to work. As she got out of her car in the plant parking lot, the automobile following her appeared as though it was about to strike her, but suddenly stopped just short of her. The car was then driven to a parking spot and stopped. She did not recognize or identify the individuals in the car.

John Davis, a shift supervisor for the Employer, states that on about February 3, when he arrived at work for the midnight shift, an employee informed him that "the union people were outside." Davis checked the parking lot and found no one there. He then went back inside and obtained a description of the automobile that "the Union people" allegedly were in. Davis got in his own car, left the Employer's premises and continued his search. He located a car matching the description given him parked at a local drive-in restaurant. He noted the license number and subsequently learned that the car belonged to Phillip Pope, an agent of the Petitioner. When he returned to the plant, he described the incident to the employee who

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[11] See Appendix 2b.

related the parking lot incident above. She informed him that a car such as he had described had been riding by her house and had followed her to work.

Petitioner's agent, Pope, categorically denies having participated in any of the above-related incidents.

The undersigned finds the leaflet to be unobjectionable in the context of this objection. Assuming the remaining incidents most favorable to the Employer, the undersigned finds insufficient evidence to establish that such incidents created a general atmosphere of confusion and fear of reprisal among the employees which would have affected their freedom of choice in the election. Objection 2 is overruled.

OBJECTION 3:

The Employer presented four witnesses who stated that their cars were damaged by person(s) unknown while parked in the Company parking lot on about April 13. Two other Employer witnesses state that they observed a person whom they could not identify, but whom they describe as a tall, slim white male with black hair striking the autos in the parking lot with what appeared to be a hammer. The individual doing the damage fled the scene with another individual in what appeared to be a white 1967 or 1968 Pontiac with a black top. Yet another Employer witness states he observed a car of this description at the home of a Petitioner adherent on about April 18, while a Petitioner agent was also present. This witness could not provide the identity of its owner.

The Employer contends that by the above testimony it has shown that the automobile used in the vandalism was either driven by an agent of the Petitioner or someone known to the Petitioner with its permission.

The undersigned finds that the objection is without merit. The Employer has failed to provide any probative evidence, nor was any adduced during the investigation, attributing the vandalism to the Petitioner or its agents or that such vandalism interfered with the election process to such an extent that it materially affected the results of the election.[12] Accordingly, Objection 3 is overruled.

OBJECTION 4:

The Employer objects to Petitioner's leaflet entitled "Wellman 'Double-Crossed' Us on Our Pay Raise!" which was distributed on April 18 and 19.[13] The Employer argues that the leaflet contains blatant lies, misrepresentations and false implications. The issue of back wages, according to the Employer, was perhaps the primary issue in the campaign and, in order to comprehend the falsity of the Petitioner's handbill, the history of the recent wage increase must be considered.

The Employer states that prior to the announcement of President Nixon's 90-day freeze on wages on August 15, 1971, the Employer had notified the employees that a general wage increase would be effective August 16, 1971. As a result of the President's announcement, it was necessary to postpone the increase pending further governmental instructions. On September 16, 1971, the Employer requested an exemption from the freeze.[14] The Office of Emergency Preparedness denied the request on October 6, 1971.[15] The same month, the Employer notified its employees by letter and by an article in the Company newspaper of the denial of its request.[16]

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[12] *Tampa Crown Distributors, Inc.*, 118 NLRB 1420, 1421 and the cases cited therein.

[13] Copy attached hereto as Appendixes 6, 6a, 6b and 6c.

[14] Copy of letter to OEP attached hereto as Appendixes 7, 7a and 7b.

[15] Copy of letter from OEP attached hereto as Appendix 8.

[16] Copy of letter and newspaper excerpt attached as Appendixes 9 and 9a.

On November 14, 1971, with the commencement of Phase II of the President's Program, the Company was authorized and did grant the wage increase scheduled for August 16, 1971. It was not at that time authorized to grant any retroactive payment of wages to its employees nor had it notified the employees that it had any intentions of doing so. On January 27, new regulations were promulgated which authorized the Employer to pay retroactive pay for the period between August 16, 1971, and November 14, 1971. The Employer opted not to grant the payment of the wages. The Employer argues that all references to "double-cross," "election lie," "ELECTION BALONEY," "back pay" and "Crying Act" in this leaflet are false since its presented evidence reveals it truthfully informed the employees of its actions to grant the increase and did so as soon as authorized. In addition, the Employer states it never promised to grant its employees any back pay. The Employer also contends that the letters addressed to Petitioner representatives, Appendixes 6a and 6b, are intentional misrepresentations in that they were presented by the Petitioner to mislead the employees into believing that the Employer had lied in the first election while, on their faces, these letters admit that authorization for granting back wages are not permitted until five months after the original election. The Employer contends that the deletion of certain portions of WEllman's letter to the employees (Appendix 6b) was done for the purpose of implying that the denial was based upon an application for approval of back wages which it was not. The Employer further objects to the article, "Uncle Sam Saved Us!" (Appendix 6c) contending that Petitioner intentionally coupled the issue of back pay to the setting aside of the first election in order to deceive and mislead the employees into believing that the Employer had violated their rights to a fair election on matters concerning back wages which it had not.

The Employer acknowledges that the Petitioner distributed an earlier leaflet on about February 11, that also dealt with the subject of back wages.[17]

---

[17] Attached hereto as Appendix 10.

The undersigned has carefully read the contested leaflet in light of the background regarding the wage increase and is of the opinion that the handbill constitutes permissible election propaganda, which the employees were able to identify and evaluate for themselves. Accordingly, Objection 4 is overruled.

CONCLUSIONS

As all of the Employer's objections have been overruled and as the Petitioner has received a majority of the valid ballots cast in the election of April 19 and 20, the undersigned will issue a Certificate of Representative.

CERTIFICATION OF REPRESENTATIVE

IT IS HEREBY CERTIFIED that Textile Workers Union of America, AFL-CIO-CLC, has been designated and selected by a majority of the employees in the appropriate unit as their representative for the purposes of collective bargaining, and that, pursuant to Section 9(a) of the Act, as amended, the said labor organization is the exclusive representative of all the employees in such unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

Dated at Winston-Salem, North Carolina, this 14th day of June 1972.

/s/ Reed Johnston

Reed Johnston, Regional Director
National Labor Relations Board
Region 11
1624 Wachovia Building
Winston-Salem, North Carolina 27101

SPECIAL UNION MEETING

"D" Shift meeting at 4:15 P.M. today (Tuesday) immediately after work, at the Johnsonville T.W.U.A. Union Hall.

IS THIS WHERE YOUR BACK PAY WENT???

$$$$$$$$$$
"Big" Jack (G.) for $Goldmine$ Wellman just
$$$$$$$$$$

bought a *Two* Hundred Eighty-Five Thousand ($285,000) House and Plantation on January 11, 1972 of this year.

Come out to your union meeting and see actual photo copies of two land deeds from the Official Williamsburg County Court House Records. These records show official proof that the President of Wellman Industries purchased a $285,000 Plantation of January 11 of this year.

Lately, the Wellman Company has been trying to "poor mouth," us workers. You be the judge! It seems to us if the President of Wellman Industries can buy himself a $285,000.00 Plantation and House, he could certainly have afforded to pay us our thirteen (13) weeks back pay from August 15 through November 15, 1971

VOTE YES–FOR HIGHER WAGES AND BETTER WORKING CONDITIONS!

ISSUED BY: IN-PLANT ORGANIZING COMMITTEE–
T.W.U.A. AFL-CIO

If you have to stay a little after 4:00 P.M., come by the Union Office regardless to what time you get off!

Mr. Wellman who insisted that the denial "has inflicted a gross inequity on company employees."

The request for exemption from the presidential order was based on the fact that about 1,050 of the company's about 1,250 employees were due for a pay increase scheduled to begin on August 16 as announced before order was imposed. In addition to a general pay increase, the company had spent some time preparing to wipe out some inequities in pay rates between different jobs.

"We realize that Phase II is designed to combat inflation. In my opinion, this should not limit the Textile industry unreasonably in its effort to increase wages. The Textile industry has been depressed and has suffered from foreign imports. We are most anxious to carry out our plans to raise wages for our employees," Mr. Wellman concluded.

77a

The stories printed on this page were "used on us" before we voted at the NLRB election last November.

Wellman was crying their eyes out because they could not pay us the increase that should have been paid us on August 16, 1971.

At least – so it seemed. But, we of the Plant Organizing Committee didn't believe one word of it.

One of our leaflets – in fact – described the act as "CROCODILE TEARS!"

They put the "monkey" on the back of the Nixon Administration. Wellman wrote the denial "HAS INFLICTED A GROSS INEQUITY ON COMPANY EMPLOYEES."

Well, we say that statement was a hunk of ELECTION BALONEY.

The stories on the next two pages will PROVE TO YOU THAT the Economic Stabilization Program ALLOWS HIM TO PAY US EVERY NICKEL AND DIME of the pay raise he announced would be effective last August 16th.

There is plenty of time left before we vote for Wellman to announce they are going to do the decent and honest thing – that they are going to PAY US WHAT THEY OWE US – even though we are not protected by a UNION CONTRACT AS SO MANY MILLIONS OF AMERICAN WORKERS ARE!

LET THIS WELLMAN "DOUBLE-CROSS" ON OUR BACK PAY BE A LESSON TO US THAT WE CAN NEVER, EVER BELIEVE ANOTHER WORD THEY TELL US!

YES! Use Our Single Cross

To Beat Their Double-Cross

BEST COPY AVAILABLE

76a

Don't Blame Nixon

Wellman "Double-Crossed" Us On Our Pay Raise!

SEPTEMBER, OCTOBER 1971 JOHNSONVILLE, S. C.

Wellman Asks Approval For Wage Increase

Officials of Wellman Industries are ready to take what President John G. Wellman said will be "immediate necessary steps to put into effect an announced wage increase" forced on company employees by the freeze on prices and wages ordered by the Nixon administration." The move is being made under provisions of Phase II of the Economic Stabilization Program. Earlier attempts at getting an exemption from the presidential freeze were unfortunately rejected by the Atlanta Regional Office of the Office of Emergency Preparedness (OEP).

The refusal of the OEP to allow Wellman to go ahead with wage increases for company employees has drawn strong criticism from

Here's a neat trick:

It Was An Election Lie!

day freeze ordered by Pres. Nixon in the first phase of his economic stabilization policy.

A decision by the U.S. comptroller general held that the revised Economic Stabilization Act passed by Congress last December required retroactive payments to these groups of federal workers:.

- More than 200,000 employes, both salaried white collar and hourly-paid blue-collar workers, who were due automatic pay step-ups during the Aug. 15 to Nov. 14 freeze period. Their raises were held up until Nov. 15 and the amount of retroactivity is estimated at $7.2 million for salaried employes and $1.5 million for the blue-collar groups.
- An estimated 60,000 blue-collar workers whose pay is adjusted periodically on the basis of wage comparisons with private industry jobs in the same locality.

The workers who will benefit are those at establishments where wage surveys had been ordered before Aug. 15, 1971, but had been held up or had the effective date postponed by presidential order.

In most cases, however, the amount of the increase was trimmed back from the comparability rate to stay within the 5.5 percent Pay Board guideline. The retroactivity that will now be paid to this group is estimated at $5.2 million.

Retroactive Pay Guide Is Approved

The Pay Board has spelled out in a new set of regulations the terms and conditions under which workers can receive retroactive pay caught in the 90-day freeze of Phase 1 of the wage-price controls.

The regulations were adopted unanimously to put into operation the board's interpretation of those provisions of the law extending the Economic Stabilization Act which allowed retroactive pay increases caught in the freeze period.

The board ruled that retroactive pay increases held up by the freeze may be put into effect immediately for units of 5,000 or fewer employes if the raise does not exceed 7 percent.

If the raise is more than 7 percent, it may be paid immediately in units of this size if price increases or tax or budgetary allowances had been made in anticipation of the wage boost.

In these cases, the employer is required to notify the Internal Revenue Service within 20 days after the retroactive wage increases are paid.

In all other case involving retroactivity—units of more than 5,000 workers or raises above 7 percent where there has been no anticipatory price, tax or budget allowances – the Pay Board must be notified in advance of payment, and the parties must hold themselves available to justify the action.

If there is no challenge to these raises by the employer or by five or more members of the pay board, they may be put into effect 14 days after notification to the board.

VOTE "YES"

Wellman Now Has Official Authority To Give Us Our Back Pay!!

TIMME CORPORATION
P. O. BOX 1000
WILMINGTON, NORTH CAROLINA 28401
TELEPHONE (919) 762-1000

February 3, 1972

Mr. Julius R. Fry
Textile Workers Union of America
404 State Street
Greensboro, North Carolina
27425

Dear Mr. Fry:

The 6% pay increase for the period August 30, 1971 through November 14, 1971 will be paid as a separate paycheck on Friday, February 11, 1972.

Official authorization for such payment of heretofore frozen wages was published in the Federal Register, Volume 37, No. 18, dated January 27, 1972.

Very truly yours,

TIMME CORPORATION

C. E. Bergamini
President

CEB/epp

No "Double-Cross" When You Have A Good Company And A Good Union!

Retroactivity Ordered On Frozen Federal Pay

More than 260,000 federal employes will receive at least partial retroactive payment of pay raises that were blocked during the 90-

81a

Don't Vote The Double Cross

"YES"

X

Vote For Yourself!

WELLMAN INDUSTRIES INC.

JOHNSONVILLE · SOUTH CAROLINA 29555
(803) 386 2011 · CABLE: WELLMAN

October 14, 1971

Dear Fellow Employees:

Enclosed is a copy of a letter we have received from the Executive Office of the President, Office of Emergency Preparedness.

The Office of Emergency Preparedness has denied our application for an

We, of course, will be subject to the rules and regulations set forth by the President's Executive Office Pay Board under Phase II of the Economic Stabilization Program.

Sincerely,

John G. Wellman

So . . . Where Is Our Back Pay Now?

80a

X

Alton Packaging

PAPERTUBE DIVISION
ALTON BOX BOARD COMPANY
ALTON, ILLINOIS 62002
TELEPHONE (618) 465-6822

February 3, 1972

Mr. R. L. Roper
International Representative
Textile Workers Union of America
722 Brooks Building
Hendersonville, North Carolina 28758

Re: Retroactive Pay Increase - Section 203 (c) (2)
Economic Stabilization Act Amendments of 1971

Dear Mr. Roper:

The above regulation was printed in the Federal Register on January 27, 1972 thereby making possible the payment of the deferred wage increase which was to be effective on October 4, 1971 at our Hendersonville, North Carolina plant. This wage increase was not paid from October 4 through November 13, 1971 because of economic stabilization controls.

The wage increase is $0.13 per hour and the adjustment for the above period will be paid to eligible employees and will be included on their regular payroll checks for week ending February 6, 1972 and will be payable on February 11.

Sincerely yours,

John N. Livingstone, Manager
Industrial Relations

JNL:cb

cc: P. J. Richnak

Where Is Our Back Pay?

Agents of the United States Government investigated the objections -- they investigated WELLMAN INDUSTRIES statements made to US.

And after a complete investigation of all the FACTS -- THEY FOUND THAT WELLMAN INDUSTRIES LIED TO US AND VIOLATED OUR RIGHTS TO A FAIR ELECTION!

GOOD OLD UNCLE SAM also said to Wellman -- "YOUR EMPLOYEES WILL HAVE ANOTHER ELECTION. THEY WILL HAVE AN ELECTION UNDER FAIR CONDITIONS."

83a

Is There Any Reason Why We Should Ever Believe 'Em Again?

BEST COPY AVAILABLE

4-15-72 Published by THE WELLMAN PLANT EMPLOYEES ORGANIZING COMMITTEE, JOHNSONVILLE, S. C.

"ABE" LINCOLN KNEW!

"HONEST ABE LINCOLN" was a great and humane man. He had a knack of being able to "spot" the phonies, the big-mouths, the liars and the big shots who pushed little people around!

LINCOLN made a famous statement. He said, "You can fool all of the people some of the time — you can fool some of the people all of the time — but you can't fool all of the people all of the time."

After reading this paper we want to ask, "Were YOU one of those who were fooled by the "WELLMAN CRYING ACT" about our pay increase a couple of days before you voted last November?

NOW THAT YOU HAVE READ THE FACTS ABOUT OUR BACK PAY -- WILL YOU EVER BELIEVE ANOTHER WORD THAT WELLMAN TELLS US?

82a

Uncle Sam Saved Us!

WHY ARE WE VOTING AGAIN? Well, our TWUA officers found out that WELLMAN INDUSTRIES told us bare-faced LIES before we went into the election booth last November. SO THEY OBJECTED TO UNCLE SAM!

Supreme Court, U. S.
FILED
OCT 15 1975
MICHAEL RODAK, JR., CLERK

No. 75-228

In the Supreme Court of the United States

OCTOBER TERM, 1975

WELLMAN INDUSTRIES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN C. MILLER,
Acting General Counsel,
JOHN S. IRVING,
Deputy General Counsel,
NORTON J. COME,
Deputy Associate General Counsel,
LINDA SHER,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 40a-41a) is unreported. The Board's decision and order (Pet. App. 1a-39a) are reported at 211 NLRB No. 96. The underlying Decisions, Directions of Election and Certification of Representatives (Pet. App. 42a-74a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1975, and a timely petition for rehearing *en banc* was denied on May 22, 1975. The petition for a

writ of certiorari was filed on August 12, 1975. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board properly held that an employer's objections to two representation elections presented no material issues of fact requiring a hearing.

STATUTE INVOLVED

Section 9(c) of the National Labor Relations Act, 61 Stat. 143, as amended, 29 U.S.C. 159(c) is reproduced in the petition (Pet. 2–4). Section 8(a) of the Act, 61 Stat. 140, as amended, 29 U.S.C. 158(a) provides in pertinent part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

On November 17 and 18, 1971, the National Labor Relation Board's Regional Director conducted a representation election among production and maintenance employees of petitioner, Wellman Industries, Inc. (the "Company"). The Textile Workers of America, AFL–CIO (the "Union") lost by a vote of 499–488 (Pet. App. 47a–48a). Thereafter, the Union

filed objections to the election complaining, *inter alia*, of alleged misrepresentation in a Company handbill, entitled "WAS THE UNION AFRAID TO SHOW THIS CONTRACT", distributed to the employees just before the polls opened for balloting, which quoted wage rates from a contract between the Union and another employer in Hendersonvile, North Carolina (Pet. App. 50a–51a, 54a–56a).

Pursuant to the Board's Rules and Regulations, Series 8 (29 C.F.R. 102.69(c)), the Board's Regional Director conducted an administrative investigation, affording the parties full opportunity to submit pertinent evidence. The investigation revealed that the contract from which the Company took the quoted minimum prevailing rates had in fact been cancelled and superseded more than a year earlier, on October 5, 1970, by a new contract, currently in effect, which scheduled increases of 13 cents in both October 1971 and October 1972 for all job classifications mentioned by the Company in its handbill. Therefore, the handbill's statement that *"there are no wage increases in the years 1970 and 1972"* (emphasis in handbill) "was not factual" (Pet. App. 51a). The Regional Director concluded that these misrepresenatations were matters of vital concern to the voters, that the voters were not in a position to know the true facts, and that the misrepresenatations could reasonably be expected to have a substantial effect on the election. The Director also held that, assuming the truth of the Company's assertion that the handbill was distributed as early as November 15, 1971, and given the nature of the misstatements, the

Union did not have an effective opportunity to reply before balloting began on November 17 (Pet. App. 50a–52a). Consequently, the Regional Director set aside the election results and ordered that a second election be conducted (Pet. App. 53a–54a).[1] The Company's request for review was denied by the Board (Pet. App. 13a–14a).

On April 19 and 20, 1972, a second representation election was conducted. A majority of the employees (557–466) voted for the Union (Pet. App. 64a–65a). The Company filed timely objections, alleging, *inter alia,* that certain messages circulated by the Union to the employees constituted false and improper election propaganda (Pet. App. 65a–66a).

The Company asserted that a Union handbill suggested that a personal transaction of its president was financed by corporate funds accumulated by denying the employees retroactive wage increases which they had lost when an announced wage increase was delayed because of the wage-price freeze of 1971 (Pet.

[1] In February 1972 the Company requested the Regional Director and the Board to furnish it with all affidavits and statements upon which the Regional Director relied in making his findings in the first election. In accordance with established Board procedure all such requests were denied. On January 25, 1973, the Company instituted an action pursuant to the Freedom of Information Act, 5 U.S.C. 552, alleging that it was entitled to all affidavits obtained pursuant to investigation of the first election. The district court dismissed the complaint (*Wellman Industries, Inc.* v. *National Labor Relations Board*, 82 LRRM 2857 (D. S.C.)), the court of appeals affirmed (490 F.2d 427), and this Court denied certiorari (419 U.S. 834).

App. 67a);[2] and that a recorded telephone message had the same effect (Pet. App. 69a).

The Company also proffered a leaflet which had been distributed by the Union on April 18 and 19 entitled "Wellman 'Double-Crossed' Us On Our Pay Raise!" (Pet. App. 76a–77a). The Company asserted that this leaflet contained misrepresentations as to the reasons for the Company's withholding of a promised

[2] The handbill read (Pet. App. 75a):

"SPECIAL UNION MEETING

"D Shift meeting at 4:15 P.M. today (Tuesday) immediately after work, at the Johnsonville T.W.U.A. Union Hall.

"IS THIS WHERE YOUR BACK PAY WENT???
$$$$$$$$$$
"Big Jack (G.) for $Goldmine$ Wellman just
$$$$$$$$$$

bought a *Two* hundred Eighty-Five Thousand dollar ($285,000) House and Plantation on January 11, 1972 of this year.

"Come out to your union meeting and see actual photo copies of two land deeds from the Official Williamsburg County Court House Records. These records show official proof that the President of Wellman Industries purchased a $285,000 Plantation of [sic] January 11 of this year.

"Lately, the Wellman Company has been trying to 'poor mouth', us workers. You be the judge! It seems to us if the President of Wellman Industries can buy himself a $285,000.00 Plantation and House, he could certainly have afforded to pay us our thirteen (13) weeks back pay from August 15 through November 15, 1971.

"VOTE YES—FOR HIGHER WAGES AND BETTER WORKING CONDITIONS!

"ISSUED BY: IN-PLANT ORGANIZING COMMITTEE-T.W.U.A. AFL–CIO.

"If you have to stay a little after 4:00 P.M., come by the Union Office regardless of what time you get off!"

wage increase during the nationwide wage-price freeze of August 15, 1971, and that it falsely implied that the Company had promised and thereafter reneged on a promise to grant "back wages" to August 16, 1971, the date when a general wage increase was originally scheduled to go into effect (Pet. App. 72a).[3]

The Regional Director considered the Company's contentions and arguments, but concluded that the leaflets and the telephone message were "permissible election propaganda which the employees could evaluate for themselves" (Pet. App. 69a, 74a). Accordingly, on June 14, 1972, the Regional Director issued a Second Supplemental Decision and Certification of Representatives in which he overruled the Company's objections and recommended that the Union be certified as the exclusive bargaining representative of the unit's employees (Pet. App. 64a–74a). The Board

[3] The Company argued that it had notified its employees that a general wage increase would take effect on August 16, 1971, but, as a result of a wage-price freeze and the Office of Emergency Preparedness' subsequent denial of its request for an exemption on October 6, 1971, it had to postpone the increase until November 14, 1971, when it received authorization from the government and granted an increase from that date. The Company was not authorized on November 14, 1971, to grant any retroactive payment of wages, however, and it had not notified its employees of any intention to do so. Not until January 27, 1972, did the Company receive authorization to pay its employees retroactive pay for the period between August 16, 1971, and November 14, 1971. However, it opted not to grant the payment of "back wages" for this period. The Company contended that accusations in the leaflet of "double-cross" were false because the Company informed the employees of its actions to grant the increase and did so as soon as possible, but had never promised to grant them any "back wages" (Pet. App. 72a–73a).

denied the Company's request for review of the Second Supplemental Decision (Pet. App. 14a–15a).

Thereafter, the Company refused to bargain and the Board issued an unfair labor practice complaint. After unfair labor practice proceedings,[4] the Board held that the Company had violated Section 8(a)(1) and (5) of the Act and ordered it, *inter alia,* to bargain with the Union upon request (Pet. App. 3a–7a).

The court of appeals in a *per curiam* enforcement of the Board's order held that petitioner had illegally refused to bargain, and further stated that (Pet. App. 41a):

> the board properly set aside the results of the first election and overruled the company's objections to the second election without a hearing because there were not substantial and material factual issues with respect to either.

ARGUMENT

Petitioner admits its refusal to bargain, but contends that the Union's objections to the first election and the Company's objections to the second election presented material issues of fact which the Board should not have decided without an evidentiary hearing.[5] In effect, the Board accepted the Company's

[4] An evidentiary hearing was held on the Company's claim of newly discovered evidence relating to an election objection which the Company is no longer contesting (Pet. App. 4a, 26a–38a). No issue pertaining to that aspect of the case is raised here.

[5] There is no dispute concerning petitioner's assertion (Pet. 8–9) that the law requires that where "substantial and material" factual issues are raised in objections, an evidentiary hearing must be held. *E.g., National Labor Relations Board* v. *Bata Shoe Co.*, 377 F. 2d 821, 825–826 (C.A. 4), certiorari denied, 389 U.S. 917. The Board's rules so provide (Series 8, 29 C.F.R. 102.69(c)).

allegations concerning the matters on the handbills as true, and simply determined whether those matters were legally sufficient to justify setting aside the election.

In the first election the Company did not show that a hearing was necessary for the Board to conclude that the wage rates set forth in its handbill entitled "WAS THE UNION AFRAID TO SHOW THIS CONTRACT" were inaccurate. The only evidentiary conflict concerning this handbill was the precise date of its distribution. The Director assumed distribution on November 15, 1971, the earliest date suggested by the Company. In view of the Company's undeniable misrepresentations making invidious comparisons between wage rates in another unionized firm and the Company, he properly concluded that the Union did not have sufficient opportunity to respond before the polls opened on November 17 (*supra*, pp. 3–4).

The Company's objections to the second election were based upon a recorded Union telephone message and two union handbills, "Special Union Meeting" (*supra* n. 2, p. 5), and "Wellman 'Double-Crossed' Us on Our Pay Raise!" (discussed *supra* n. 3, p. 6). The first handbill, and the telephone message, simply identified the firm's president with the Company and suggested, argumentatively, that, if he could afford to buy an expensive home, his Company could afford to pay back wages lost as a result of the federal wage freeze (Pet. App. 75a). The second handbill stated only that there was a discrepancy between the Company president's asserted outrage at the wage freeze, and the Company's failure to pay a retroactive wage

increase which the government, some 2½ months before the election, had authorized the Company to pay if it wished (Pet. App. 76a–77a). The message and the handbills were thus factually true on their face, but contained in addition the kind of propaganda typical of organizing campaigns. Comparison of the Company's objections (Pet. App. 65a) with the contents of the message and the handbills (Pet. App. 69a, 75a, 76a) plainly shows that the Regional Director had ample grounds for concluding that the Company was objecting to the arguments, not to the facts set forth. Responsibility for weighing the Union's arguments against the Company's in light of the known facts concerning what had been said and done about the wage freeze belonged to the employee-electorate alone. Petitioner thus proffered no issue of material fact which would have warranted a hearing. Cf. *National Labor Relations Board* v. *Tennessee Packers, Inc., Frosty Morn Div.*, 379 F. 2d 172, 178 (C.A. 6), certiorari denied, 389 U.S. 958.[6]

[6] The cases relied on by petitioner are not to the contrary. In those cases, the companies' objections, unlike those here, put in issue factual statements which the company alleged to be false. Thus, in *Henderson Trumbull Supply Corp.* v. *National Labor Relations Board*, 501 F. 2d 1224, 1225 (C.A. 2) (Pet. 10, 12, 13, 14), the company contended that the union mistated the amount of its profits and falsely asserted that its president had bought a new house. In *Argus Optics* v. *National Labor Relations Board*, 89 LRRM 2280 (C.A. 6) (Pet. 10,13, 14), the company contended that union propaganda had falsely attributed parent corporation profits to the company, and it was a disputed factual issue whether a subsequent union clarification remedied the former assertion. And in *National Labor Relations Board* v. *Janler Plastic Mold*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JOHN C. MILLER,
Acting General Counsel,
JOHN S. IRVING,
Deputy General Counsel,
NORTON J. COME,
Deputy Associate General Counsel,
LINDA SHER,
Attorney,
National Labor Relations Board.

OCTOBER 1975.

Corp., 82 LRRM 2174 (C.A. 7) (Pet. 10, 11, 13), there were unresolved factual disputes as to whether a union agent had threatened job losses, and whether union contentions as to specific benefits which follow from unionization constituted material misrepresentations.

U.S. GOVERNMENT PRINTING OFFICE: 1976